

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





**BRIEF AND APPENDIX FOR  
APPELLANT**

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*United States Court of Appeals  
for the District of Columbia*

IN THE **FILED** SEP - 2 1947

**United States Court of Appeals**

**CLERK**

**DISTRICT OF COLUMBIA.**

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**No. 9593**

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**DR. A. P. KASMER, *Appellant,***

**v.**

**PAUL STERNAL, *Appellee.***

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**Appeal from the District Court of the United States for the  
District of Columbia.**

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IN THE  
**United States Court of Appeals**

DISTRICT OF COLUMBIA.

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No. 9593.

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DR. A. P. KASMER, *Appellant*,

v.

PAUL STERNAL, *Appellee*.

---

Appeal from the District Court of the United States for the  
District of Columbia.

---

**BRIEF FOR APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal by the appellant, Dr. A. P. Kasmer, defendant below, from a judgment of the District Court of the United States for the District of Columbia entered on the verdict of a jury in favor of the appellee, Paul Sternal, plaintiff below, in the sum of thirty thousand dollars (\$30,000) as damages alleged to have been sustained by the plaintiff as a result of the alleged malpractice of the defendant.



Jurisdiction of this court is based on Section 17-101 of the D. C. Code (1940).

The printed portions of the record are contained in the appendix to this brief and references thereto are herein made by the symbol "(App. —)". A joint appendix is not available because plaintiff's counsel preferred to read defendant's brief before determining what portions he desired to designate for printing.

### **STATEMENT OF CASE.**

The plaintiff, Paul Sternal, is now 69 years of age, formerly an accountant with the OPA. (App. 9) He suffered a severe heart attack in April, 1942, necessitating his stay in the hospital for eight weeks. (App. 21) He has been wearing false teeth, including an upper and partial lower denture, for the past 26 years. (App. 19) In June, 1943, he procured a new set of dentures from a dentist in New York City (App. 19), and approximately a year later, while in Chicago on July 15, 1944 (App. 19), he observed and felt that three sharp prongs or points in the lower dental plate on the left side had caused a puncture in his tongue. (App. 10) This lesion annoyed him quite a bit while speaking and eating (App. 10), and it was uncomfortable. (App. 19) In August of 1944, it was the size of a pinhead. (App. 20) His tongue continued to hurt him up to September 20, 1944, when he went to see the defendant, Dr. A. P. Kasmer. (App. 19) Though the pain in his tongue was continuous during this period, he did not deem it necessary to see a physician sooner, since he thought the lesion would go away by itself; and he treated it in his own way by washing and gargling with salt water after every meal and in the morning and evening because he thought salt was a good thing with which to sterilize his mouth. (App. 21)

Plaintiff was referred to the defendant and made an appointment with him for September 20, 1944. At that time the lesion on his tongue was about two months old, and did not seem to show any tendency of healing up; it was then

about the size of the phosphorus end of a match, an old style wooden match (App. 20), and one could see the raw flesh appearing through the puncture (App. 10); plaintiff's tongue had a sort of reddish area on the side, extending over the top (App. 56); and he requested the defendant to examine the condition of his mouth, dentures and tongue. The plaintiff, himself, blamed the faulty dentures he was then wearing as the cause of the condition of his tongue, and the defendant agreed with him that his trouble was due to his old dentures. (App. 20, 21) The defendant advised him never to put the old lower plate in his mouth again because that was the cause of his trouble (App. 10), and that to cure his condition it would be necessary first to remove the cause, which the defendant would attempt to do by giving the plaintiff a new set of false teeth. (App. 11) Defendant stated that another reason he advised the new set of teeth was that the old case was very loose in the plaintiff's mouth, that it was too large and would not stay in place. (App. 52) He therefore proceeded to take a preliminary impression of the plaintiff's upper and lower jaws. (App. 52) With respect to what conversation ensued on this first visit, regarding treatment of the plaintiff's tongue condition, there is a dispute in the evidence. The plaintiff claimed that the defendant stated that he could cure the tongue condition (App. 11), and that he gave the plaintiff a prescription for a medication known as "Metaphen," and advised him to swab the lesion on his tongue with it three times a day (App. 11); that he asked the defendant if it would not be advisable for him to see a physician regarding his tongue, but defendant claimed that he could do as much for him as a physician could do. (App. 11) The defendant stated that he observed the tongue was reddish (App. 56), but did not believe he recommended any medication for the tongue on the defendant's first visit; however, on the second or third visit he suggested that the plaintiff use on it an antiseptic known as "Metaphen," and stated that it would be advisable for him to see a physician if the tongue persisted in bothering him. (App. 52)

The plaintiff stated he thereafter visited the defendant's office on the following dates: (App. 13) (The conversations and events which took place on each of them as claimed by the plaintiff or the defendant in the testimony are set forth opposite each date.)

*September 25, 1944*—Defendant states a "bite" was taken for the new denture; (App. 52) that he called Dr. Leavitt, his personal physician, and asked him to see the plaintiff if the latter called for an appointment regarding his tongue condition; (App. 53) and that he advised the plaintiff to use Metaphen on his tongue until he could see a doctor. (App. 53) Plaintiff says he wanted to obtain the name of a physician for his heart condition, and his general health, not because of his tongue, which he expected the defendant to treat. (App. 24) (Plaintiff stated he never had occasion to see the physician). (App. 24)

*October 2, 1944*—Defendant states he had the new dentures ready, and performed a "try-in" to determine their fit. (App. 53)

*October 9, 1944*—Defendant states the plaintiff's dental case was completed and the new dentures were inserted in his mouth. (App. 53)

*October 10, 1944*—Plaintiff states he asked the defendant if he should see a physician regarding his tongue condition, and was advised it was not necessary. (App. 17) Defendant denies any conversation in which he advised the plaintiff not to see a physician. (App. 53)

*October 11, 1944*—Plaintiff states his lower plates were ready for adjustment. (App. 12) Plaintiff says he discussed with the defendant the failure of his tongue to heal and that the defendant advised him not to worry about it. (App. 17) Defendant denies the conversation. (App. 54) Plaintiff says he had headaches and was feverish during this period. (App. 17)

*November 7, 1944*—Plaintiff states the lesion on his tongue was now the size of the rubber end of a pencil (App. 15) and that it had changed in color, and had a dark grey



layer of film covering the raw flesh, and appeared as if it would dry up. (App. 16, 22) It looked better to the naked eye. (App. 26)

*November 15, 1944*—Plaintiff states he felt symptoms of heart trouble coming on again. (App. 22) Plaintiff says he asked the defendant for the name of a doctor for this condition and the defendant gave him the name of Dr. Leavitt, (App. 18) but that he never went to see him. (App. 18)

Defendant states that it was during the period from October 9 to November 29 that he adjusted plaintiff's new dentures. (App. 55)

*November 29, 1944*—Plaintiff states his upper plates were ready for adjustment. (App. 12) Defendant states he asked the plaintiff why he had not seen Dr. Leavitt, and was advised by the plaintiff that he had no pain in his tongue, and his condition did not necessitate it. (App. 54)

*December 21, 1944*—Defendant denies that he saw plaintiff on this date. (App. 55)

*January 10, 1945*—Plaintiff states his tongue lesion was the size of the width of the top of his little finger. (App. 15) Plaintiff further states that it was about this time when the lesion became hard. (App. 16) Defendant denies that he saw the plaintiff on this date. (App. 55)

*February 6, 1945*—Defendant denies that he saw plaintiff on this date. (App. 55)

*March 3, 1945*—Defendant cleaned plaintiff's natural teeth, and filled one tooth. (App. 23, 55)

*March 27, 1945*—Plaintiff says the defendant advised him it would help his tongue condition to discard the first set of dentures, and that he would make him a new one. (App. 12) Defendant denies that he saw the plaintiff on this date. (App. 55)

*April 7, 1945*—Plaintiff states he again suggested to the defendant that he see a physician regarding his tongue, and that defendant denied the necessity for it. (App. 17) Defendant denies that he saw the plaintiff on this date. (App. 55)

*April 14, 1945*—Plaintiff states the defendant took impressions for a second set of dentures. (App. 14) Defendant denies that he saw the plaintiff on this date. (App. 55)

*April 21, 1945*—Defendant denies that he saw the plaintiff on this date. (App. 55)

*May, 1945*—Plaintiff states his tongue lesion was then the size of the tip of his middle finger. (App. 15)

*June 6, 1945*—Defendant denies he saw the plaintiff on this date. (App. 55)

*June 14, 1945*—Defendant states he took an X-ray of one of the plaintiff's natural teeth. (App. 55, 56)

*June 16, 1945*—Defendant states he extracted one of plaintiff's natural teeth. (App. 55) Plaintiff confirms this. (App. 23) Defendant states he again definitely advised plaintiff to see a physician regarding his tongue, (App. 56) and that he suggested a new set of dentures, without teeth on the lower left side to relieve any possible source of friction with plaintiff's tongue lesion. (App. 56)

*June 17, 1945*—Defendant denies he saw plaintiff on this date. (App. 55)

*June 19, 1945*—The second set of dentures was placed in plaintiff's mouth. (App. 24, 55) Plaintiff says his tongue lesion was the size of the width of his thumb. (App. 15) Defendant said that at this time the plaintiff's tongue lesion was larger; it was much redder and appeared eroded. (App. 56)

*June 26, 1945*—Plaintiff says this was his last visit to defendant. (App. 25) Defendant says he may have been in around this time for adjustments to his teeth. (App. 57)

On June 25, 1945 the day before his last visit to defendant, the plaintiff said he went to see Dr. Kossow, not because of his tongue but for his general condition. Dr. Kossow gave him a physical examination and discovered his tongue condition. Dr. Kossow advised him not to wear his dentures any more (App. 25) and, since he suspected cancer, told the plaintiff to see Dr. Hunter, the pathologist. (App. 18) The following day the plaintiff saw Dr. Hunter,

who made a biopsy and confirmed the diagnosis of cancer of the tongue. (App. 38) On July 13, 1945, the plaintiff went to the New York Memorial Hospital for treatment of his cancer on the advice of Dr. Kossow. There he saw Dr. Catlin. At this time his tongue lesion was quite deep, about the full depth of his tongue. (App. 22) In August of 1945, the plaintiff left the Memorial Hospital; (App. 22) however in May of 1946 a tentative operation was made on his neck by Dr. Catlin. (App. 22) On September 30, 1946, the plaintiff returned to the New York Memorial Hospital. (App. 18) On October 8, 1946, his neck was operated on for the removal of cancerous glands. (App. 18, 19) On November 15, 1946, the plaintiff was again released from the hospital. (App. 18)

In the meantime, on March 29, 1946, the plaintiff filed his suit below. At the trial the plaintiff relied on his own testimony and that of three physicians, Dr. Morris Kossow, a general practitioner, Dr. Oscar Hunter, a pathologist, and Dr. Daniel Catlin, a cancer specialist. The testimony given by the plaintiff at the trial is related above. Dr. Kossow testified concerning his treatment of the plaintiff and gave his professional opinion on various hypothetical questions. His opinions are covered in detail in the Argument herein; however, his testimony was to the effect that although irritation might cause cancer he could not say what caused the plaintiff's cancer. (App. 36) His testimony clearly demonstrated that plaintiff's cancer developed before the defendant began to treat him. (App. 35) Dr. Hunter testified that although there is a theory that irritation causes cancer he did not know what caused the plaintiff's cancer. (App. 43) With respect to the age of the cancer when he first examined the plaintiff in July 1945, his testimony also permits a strong inference to be drawn that the cancer had developed before defendant began to treat him. (App. 42) Dr. Catlin, the cancer specialist, whose testimony was taken by deposition, testified that he did not know what caused plaintiff's cancer. (App. 43)

The defendant's case consisted of his own testimony and that of Dr. Daniel Lynch, an oral surgeon. Dr. Lynch testified generally in response to hypothetical questions based on the history of the case as the defendant claimed it occurred, that the defendant's conduct was proper, and in accordance with that which would have been followed by an ordinary dentist practicing in this vicinity. (App. 47, 49) With respect to plaintiff's cancer, Dr. Lynch could not say what caused it. (App. 51)

The defendant objected to various parts of plaintiff's testimony throughout the trial and to the charge given the jury by the court. Defendant consistently and strenuously objected to the Court permitting the jury to find that the defendant's treatment caused plaintiff's cancer. However, that issue was submitted to the jury and a verdict was returned in the amount of \$30,000 (App. 6) and judgment was entered thereon, from which this appeal was taken.

#### **STATEMENT OF POINTS.**

1. The court erred in submitting to the jury the issue involving the causal relationship between the defendant's conduct and the plaintiff's cancer.

2. The court erred in submitting to the jury the issue of defendant's negligence on any theory.

3. The court erred in permitting the jury to determine whether the defendant's conduct aggravated the plaintiff's cancer.

4. The court erred in permitting improper hypothetical questions to be propounded to alleged expert witnesses.

5. The court erred in failing to submit to the jury the issue of contributory negligence.

6. The court erred in its charge to the jury on burden of proof and causation.

## SUMMARY OF ARGUMENT.

There was literally no evidence that anything that defendant did caused the cancer in plaintiff's tongue at the very site of a lesion therein which existed before plaintiff's first visit to the defendant. The cause of cancer is unknown and the testimony in the case shed no light on the cause of the plaintiff's cancer. In any event, none of the experts attributed the existence of the cancer to anything that defendant either did or failed to do. This was conclusively corroborated by the evidence that when the cancer was first diagnosed to be a cancer it appeared to be of such a state of development as reasonably to indicate that it had its inception before defendant's treatment began.

Regardless of causal relationship, there was no evidence that defendant's conduct was negligent or that such conduct either caused or aggravated the cancerous condition. The dental plates made by defendant were well made and the friction between the plate and plaintiff's lesion was reduced to a minimum by plate changes and was normal. There is not a scintilla of evidence that defendant was negligent in furnishing the plates. Nor was he negligent in prescribing applications of Metaphen and in not sooner diagnosing the lesion as cancerous. With respect to aggravation there was no evidence that defendant's treatment made the cancer worse or produced a result which would not have occurred without his treatment. There was no evidence that the cancer, which was not of defendant's making, would have developed any differently had defendant's dental services not been rendered.

It was error to permit a hypothetical question to be asked of the general physician, Dr. Kossow, as to whether the defendant dentist was skillful or unskillful in permitting the plaintiff to wear the plate even though it irritated him. The physician was not qualified to answer the question, because the standard of conduct of a physician, which was the test used, was an erroneous standard upon which to test the skill of the defendant dentist. It was also error



to permit Dr. Kossov to answer a question which sought his opinion based upon "your experience, and other facts that you observed". That question had no factual basis in the evidence and it sought an opinion from an expert on facts which were undisclosed and perhaps inadmissible. That question violated the rule that before expert opinion may be given on a hypothetical question the facts upon which the opinion is based must be disclosed and must appear in the record. Two other hypothetical questions asked of the witness were either based upon facts which were not shown by the evidence or held the defendant dentist to a standard of skill and conduct applicable only to physicians, and both were prejudicial to the defendant.

If the defendant was negligent, plaintiff's contributory negligence was clear and apparent and warranted its submission to the jury notwithstanding the failure of the defendant specifically to request an instruction on that defense under the circumstances shown in the record.

The charge to the jury was confusing and misleading in that it instructed the jury incorrectly on burden of proof and contained a rather novel and incorrect charge on contributing cause to the creation of cancer.

Apart from the errors of law made by the court in receiving evidence and in submitting the case to the jury, the jury's verdict can be explained only by attributing to the jury prejudice against the defendant because of plaintiff's conduct during the trial, which was such that on a number of occasions the court threatened to declare a mistrial.



**ARGUMENT.****I.**

There was literally no evidence that Defendant caused the Plaintiff's cancer and it was error to submit that issue to the jury.

There are only three possible grounds on which plaintiff could claim that the defendant was negligent:

(1) The failure to diagnose plaintiff's condition as cancerous so as to have adequate treatment instituted earlier.

(2) The defendant's treatment or lack of treatment in prescribing only Metaphen for the plaintiff's lesion of his tongue.

(3) The defendant's conduct in making and furnishing dental plates which were faulty and which irritated plaintiff's tongue condition.

The first of these grounds does not apply here since the failure to diagnose the condition presupposes its existence.

With respect to (2) above, we have the testimony of the plaintiff, himself, and three "expert witnesses".

The substance of the plaintiff's testimony on this subject is that the defendant gave him the name of a prescription known as Metaphen and told him to apply it, using a swab, such as cotton on the end of a match, three times a day. The defendant advised him to do this in spite of the fact that the wound might smart and hurt. (App. 11) The plaintiff stated that he used the prescription three times almost every day, except when he was sick or traveling. (App. 12, 13) He further said that the sore would bleed from time to time, especially when he applied the Metaphen. (App. 15, 22) He did not rinse his mouth out after using the Metaphen. (App. 22) The defendant also applied some medications to his mouth, but the plaintiff could not say what they were. (App. 24)

Dr. Kossov, the general practitioner, testified with respect to the Metaphen that it is an antiseptic, skin antiseptic, and that it would not cure cancer. (App. 31) He later stated that it was improper to treat the tongue lesion only with Metaphen as it changed in character and appearance over a period of eleven months because it should have been diagnosed earlier. (App. 33) On cross-examination he said that it was not possible to completely sterilize the mouth of a person; that Metaphen would not stay long on a tongue lesion because saliva would wash it off and diminish its strength within a few minutes. (App. 37)

Dr. Hunter, the pathologist, testified with respect to the Metaphen that "Ordinarily, Metaphen, even in full strength, can be applied to tissues and ulcers without any deleterious effect. If it is applied continuously, it may produce some irritation". (App. 41) He testified that he saw no evidence on the plaintiff's sore itself that showed irritation caused by an external factor such as Metaphen. (App. 39, 40) He then stated Metaphen was not the proper treatment for cancer, if there was cancer present. (App. 41)

With respect to the Metaphen, Dr. Lynch, the oral surgeon, stated that an ordinary dentist would have prescribed such a medication for plaintiff's tongue lesion on his first visit to defendant (App. 45, 46) and would have advised the use of such a medication a month later if the lesion was still painful, until a physician could be seen. (App. 46) He later said that Metaphen disappears in the mouth after it has been applied due to the fluids in the mouth. (App. 50)

The above testimony shows primarily that Metaphen is merely an antiseptic and is not at all dangerous. Further, that it is quickly dissolved in the mouth. Giving the above testimony its strongest possible probative value, we see only that Metaphen continuously applied to a tissue over a long period of time may produce "some" irritation. There is no testimony from any witness as to the extent of

irritation necessary to produce cancer. There is no testimony that an irritation produced by the application of Metaphen would or might be sufficient to produce cancer nor is there any testimony that the defendant's treatment or lack of treatment in the use of Metaphen caused or even probably caused the plaintiff's cancer.

In regard to (3) above, we have the testimony of the plaintiff and two of the same "expert witnesses".

With respect to the first set of dental plates made for him by the defendant, the plaintiff stated they were too tight and were giving him endless trouble in his gums. He couldn't wear them longer than 6 hours at a time. (App. 12) He stated they irritated his tongue wound and were not satisfactory. (App. 14) The dentures had teeth in them, though the teeth did not have any particular sharp points or prongs, but the edges of the teeth, both the uppers and lowers, rubbed against his tongue. (App. 14) The defendant filed the edges of the teeth on several visits to eliminate any possible friction. (App. 14) The plaintiff said he could not use the dentures while eating. (App. 14) The defendant then proposed and later made a new set of dentures without teeth on the left side. (App. 14)

On cross-examination, the plaintiff stated that he had been wearing false teeth for 26 years. (App. 19) He said that when the defendant made his first set of false teeth, he put the prong on the other (right) side of his mouth so it would not touch his tongue lesion. (App. 21) He then said that the dentures hurt his mouth because they were too tight and that they also hurt his tongue, but, in answer to a specific inquiry as to whether the reason he couldn't keep the dentures in his mouth longer than six hours was on account of his gums, the plaintiff answered "Yes". (App. 23) The plaintiff then stated he did not use his dentures at all for a certain period between October 9, 1944 and March 3, 1945. (App. 23) He stated that he only slept with his dentures in his mouth about three times between September 1944 and June 1945. (App. 25) He finally said

that, on the average, he wore his dentures two and a half to three hours between meals, but not during meals or at night. (App. 25)

Doctor Kossow testified as follows:

The only evidence he saw on his first examination of the plaintiff that might have caused friction or irritation of his tongue lesion was his dentures, but whether or not there was friction, he could only depend on the plaintiff's statement to him. (App. 27, 28) He stated that dental plates which are ill fitting will give rise to cancer in a larger majority of patients than those who never had a dental plate; (App. 28, 29) however, on cross examination he said that it is very common for people with natural teeth to have cancer of the tongue, and that many hundreds of thousands of people who have dentures never have cancer of the tongue. (App. 36, 37) He further stated that it would be unskillful for an ordinary physician in this vicinity to have insisted that the plaintiff wear false teeth for eight months that rubbed and irritated his tongue. (App. 30, 31)

On cross-examination this witness was asked if he could reasonably say that the plaintiff's dentures irritated the plaintiff's tongue and he answered "No, sir, I couldn't, except from what the patient told me". (App. 35) He stated that he doesn't examine dentures and can't say when they are ill fitting. (App. 35) He later stated again that he doesn't know much about dentures. (App. 36)

Dr. Lynch's testimony reveals generally that everything the defendant did with respect to the dental plates was proper for an ordinary dentist practicing in this vicinity, and his testimony leads to the conclusion that the plaintiff's dentures did not irritate plaintiff's mouth any more than any denture irritates any patient. (App. 46, 49) He said that of the number of patients with ill fitting dentures that he has seen less than one per cent have cancer. (App. 49) He stated that chronic irritation over a long period of time would produce hypertrophied tissue but it would not necessarily be cancerous, "because we see a tremen-

dous amount of that kind of thing in the mouth, especially from ill fitting dentures". (App. 50) He then said that prolonged chronic irritation of a denture *or anything else* in the mouth can produce cancer, but it is over a long period of time. (App. 50) He stated there is no known cause for cancer, although there are a lot of theories. (App. 51) He mentioned the example that pipe smokers in old Ireland contracted cancer, and also said dirty mouths might cause cancer. (App. 51) In response to a hypothetical question he stated he did not know when the cancer developed in the plaintiff's mouth. (App. 51) His testimony in no way connected the cancer with the dental plate made by defendant.

The above covers all of the expert testimony relating specifically to plaintiff's dentures. There is absolutely no testimony in the opinion of any witness that the plaintiff's dental plates were faulty. There is absolutely no testimony, in the opinion of any witness, that such plates irritated or rubbed against the plaintiff's tongue to any greater degree than perfectly well made plates, and there is no testimony that these dental plates caused or probably caused plaintiff's cancer. The most this evidence shows on behalf of the plaintiff is contained in a very general statement of Dr. Kossow that ill fitting plates give rise to cancer in more patients than those who don't wear them. Even this broad statement was substantially altered and qualified on cross examination when the doctor admitted that it is common for people with natural teeth to have cancer of the tongue, and hundreds of thousands of those who wear dentures never have such a disease.

In connection with whether the dentures caused plaintiff's cancer, particular attention should be given to the facts of the case. They show that the lower dentures were inserted in the plaintiff's mouth on October 9, 1944. (App. 53) Only about thirty days later, on November 7, 1944, the plaintiff said the lesion on his tongue had increased to the size of the rubber end of a pencil and had a dark grey



layer of film covering the raw flesh. (App. 16) Furthermore, the plaintiff had headaches and was feverish during this period. (App. 17) If these facts indicated that a cancer was beginning to form, as the plaintiff's evidence attempted to show, it seems most unusual that it could have been caused by dentures which were in the plaintiff's mouth only thirty days. Furthermore, when we consider that all of the testimony in the case points to the fact that the cancer arose in the same location as the original tongue lesion, that this lesion began on or before July 15, 1944, and that the above symptoms were present when plaintiff first visited the defendant, together with the fact that Dr. Hunter stated that cancer takes about three months to make itself apparent, (App. 40) it seems conclusive that the dentures furnished by the defendant could not have been the cause of the plaintiff's cancer.

The foregoing demonstrates the total failure of proof in the expert testimony tending to support the claim that any of the specific acts of negligence charged against this defendant were the proximate cause of the plaintiff's cancer. It is believed that a general review of the other testimony offered by these witnesses on the subject of causation will further prove the lack of sufficient evidence for consideration by the jury of this issue.

Dr. Kossow is a general practitioner of medicine. He is not a cancer specialist and he stated he knows no more and no less about cancer than the average doctor in this vicinity. (App. 26) He stated that he has studied, diagnosed or treated two or three hundred cancer cases; (App. 26) however, on cross examination, it developed that he had never treated cancer. (App. 35) He stated that he suspected cancer when he first examined the plaintiff, due to the appearance of the tongue lesion itself, the age of the plaintiff, which is the usual age of a person who develops cancer, and the history of the lesion as related to him by the plaintiff. (App. 27) He described cancer as a wild body of cells, which grows not in accordance with the law which



governs the growth of tissue, and that it acts as a parasite by destroying healthy tissue; (App. 28) that cancer is not caused by a germ (App. 28) and is not contagious; (App. 28) that "we don't know the cause of all cancers, but we do know the causes of some of the cancers." (App. 28) He said that irritation is a cause of cancer and he attempted to substantiate that statement by the fact that pipe smokers, those who smoke rough clay pipes, contract cancer of the lip. On this point, he stated on cross examination that it was the rough surface of the pipe aided by the heat which probably causes it. (App. 37) He then said people who have syphilis contract cancer of the tongue; fishermen in Scotland in the old days who stuck needles, that had been tarred, in their mouths were victims of cancer; natives in Asia who carried hot coals next to their stomachs contracted cancer; that cancer can be produced experimentally by rubbing a rabbit's ear with tar; (App. 28, 29) that the tongue is a fairly common site of cancer; (App. 31) and that the plaintiff's cancer was in its advanced stage when he first saw it—from a pathological standpoint, far advanced. (App. 31)

In response to a hypothetical question as to when the cancerous condition first developed, he answered, "Probably prior to July, 1944 \* \* \*". (App. 35) Later he was asked, "Do you know what caused the cancerous condition of this patient?" and he replied, "Do I know exactly what caused it \* \* \* No, sir". (App. 36) He had personal knowledge of the fact that in recent months the public had been requested to devote many millions of dollars for the purpose of finding the cause and cure of cancer. (App. 36)

Dr. Kossov's testimony shows only, in very general terms, that irritation might cause cancer without showing how much is necessary to produce it, and without showing that the irritation or friction allegedly caused by defendant's negligence produced it here, even assuming that defendant's conduct was negligent in making and furnishing the plates. Even the examples given by him in support of

his general statements, which are not cited from his experience but apparently from undisclosed medical books, indicate that irritation *aided by heat* is found to have caused cancer in the cases of the pipe smokers and the natives who carried hot coals next to their stomachs. His other two examples show that irritation *through the use of tar* might have caused cancer. In this respect, it should be noted that the witness also stated, "tar, we know, is a carcinogenic agent". (App. 28) No example was cited by him to prove that irritation unaided by other factors would cause cancer. He specifically did not know what caused plaintiff's cancer; and, finally, (and this should be conclusive on this point) he stated twice that in his professional opinion *the time when plaintiff contracted cancer occurred prior to his first visit to this defendant*. (App. 35) It is impossible to find, from the above even a scintilla of evidence upon which the case could be submitted to the jury to determine whether the defendant caused the plaintiff's cancer.

A general review of Dr. Hunter's testimony on the issue of causation, other than that mentioned above, is to the following effect:

Dr. Hunter is a pathologist who has made over 75,000 examinations of tissue of a cancerous nature. (App. 38) He said that *cancer is a disease of unknown cause and is very widespread throughout the human race, but usually follows some irritation, long-standing infection, or a burn, or sometimes develops without any previous known cause whatsoever*. (App. 39) He then said "*at the present time we do not know what the cause of it is*". (App. 39) He stated that "one could not tell unless one knew more of the details of the history whether this developed as a primary cancer, per se, that is developed out of a clear sky in the tongue, or whether it was secondarily engrafted upon some preceding ulcer, as the report implies there was a good bit of inflammatory reaction accompanying it—so without knowing any of the antecedent history, one would be

inclined to believe that it was probably started as an ulcer, and secondarily developed the cancerous characteristics". (App. 39) *He saw no evidence of irritation caused by external factors on the sore itself.* (App. 39) He then stated cancer takes time to develop, three months or more. (App. 40) He estimated that plaintiff's lesion had been cancerous for between three and six months, and he stated that if it had been present from the very beginning the probability was that it would have been very extensively indurated into plaintiff's neck at the time he first saw him. (App. 42) The doctor then said that there was a suggestion that the cancer was in the plaintiff's neck when he first saw him, but he wasn't sure, that he did feel some slightly enlarged lymph nodes there. (App. 42) He again said there was nothing to indicate that the plaintiff's condition was unduly irritated other than the irritation that frequently follows any superficial invasion of cells from the mouth. (App. 43) *He concluded by specifically stating that he did not know what caused plaintiff's cancer.* (App. 43)

It is apparent that Doctor Hunter's testimony adds nothing to plaintiff's lack of evidence on the causal relation between defendant's conduct and plaintiff's cancer. There is no dispute in the testimony that plaintiff had a lesion or ulcer in his tongue before he saw the defendant. What caused it to become cancerous is the vital point, and neither Dr. Hunter's testimony, nor the testimony of any other witness, is sufficient to furnish the answer. He stated that plaintiff's cancer had probably been in existence three to six months prior to the time he saw him, and he said he would assume it had been there from the very beginning of the lesion if the cancer had been extensively indurated into his neck at that time. The fact that the cancer had existed from the beginning is strengthened by the fact that Dr. Hunter also said there was an induration into the neck at the time of his examination. This is further detailed by the positive testimony of Dr. Kossow that when he first saw the plaintiff, which was on the day before plaintiff

went to Dr. Hunter, the glands in his neck were enlarged and easily palpable (App. 27) which indicated that the cancer had begun to spread to the glands in his neck. (App. 32) In this connection, it should be noted that Dr. Hunter saw the plaintiff merely to make a biopsy of his tongue, whereas Dr. Kossow subjected him to a physical examination including the neck which did reveal the induration in the neck which, coupled with Dr. Hunter's testimony, makes it conclusive that the cancer was in existence before the treatment began.

The testimony of Dr. Catlin is that he specializes in the treatment of cancer and has diagnosed or treated between 10,000 and 15,000 cases. (App. 43) In his testimony, which was by deposition, this doctor refused generally to give expert testimony, but he did state that he does not know when plaintiff's cancerous condition was first noticeable in the plaintiff's mouth *nor does he know what could have caused the cancerous condition.* (App. 44) There is certainly nothing in this witness' testimony which adds anything to plaintiff's attempt to show a causal relation between defendant's conduct and plaintiff's cancer. In fact it proves that the one witness in the case who actually specializes in the disease could not say when the cancer developed or what caused it.

The above review of the so-called expert testimony herein leads to the same conclusion reached by the court in *Falco's case*, 260 Mass. 74, 156 N. E. 691. The court there said:

"The final and decisive inquiry therefore, was, whether copper poisoning of itself had caused primary cancer. It was a question of fact, and not a matter of speculative conjecture . . . The claimant accordingly must rely on the evidence of her own witnesses, and of the impartial expert, also called by her, to which sufficient reference previously has been made . . . But, when this evidence is given its full probative effect, none of these witnesses would go further than to say that it was possible, or perhaps probable, that primary

cancer could be caused by copper or metal poisoning. The question was left in an atmosphere of such uncertainty and doubt that no causal connection between the employee's work and the disease which the commissioner found caused his death had been affirmatively shown."

The following are other compensation cases in which doubt as to the cause of cancer was expressed and which resulted in findings for defendants:

*Slack v. C. L. Percival Co.*, 198 Iowa 54, 199 N. W. 323  
*West Side Coal & Mining Co. v. Industrial Commission*, 321 Ill. 61, 151 N. E. 593

*Beerman v. Public Service Coordinated Transport*, 123 N. J. L. 479, 9 A. (2d) 690

*Trojanowska v. Sonman Shaft Coal Co.*, 123 Pa. S. 17, 185 A. 860.

The jury's verdict in this case for \$30,000 was unusually large and was undoubtedly based either upon a finding that defendant caused plaintiff's cancer or upon the influence created by the court's submission of that issue to the jury. A verdict solely on the ground that defendant aggravated plaintiff's cancerous condition would have been in a lesser amount and probably limited to damages for pain and suffering. But even if the jury did not find that defendant caused the cancer, it was reversible error to permit that issue to be considered by it. The error pervades the entire verdict.

The above detailed review of the testimony on causation conclusively establishes that there was no evidence warranting submission of the issue to the jury. It is apparent that plaintiff's counsel was satisfied to elicit from the expert witnesses the information that there is a theory that irritation might produce cancer. Whether inadvertently or otherwise, he was careful not to ask the vital question of an expert witness in a malpractice case, that is, whether what the defendant did or failed to do produced or probably produced the cancer for which damages were claimed.



Without this information from the experts the jury was left to pure speculation.

As stated by former Chief Justice Taft, while sitting on the Circuit Court, in the oft-quoted case of *Ewing v. Goode*, 78 F. 442, which also involved a dread and mysterious disease:

“But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence . . . Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury. When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.”

The fallacy in plaintiff's proof may also be illustrated as follows. He shows that:

1. Irritation may produce cancer;
2. Defendant's treatment irritated plaintiff's tongue;
3. Defendant produced plaintiff's cancer.

This is absolutely the most that plaintiff has proved on this issue and this syllogism gives the plaintiff the benefit of the very real doubt as to the sufficiency of the evidence to warrant (2) above that defendant's treatment irritated the plaintiff's tongue, omitting consideration of the further failure of proof that such irritation, if any, resulted from any negligent conduct on defendant's part. The difficulty with the syllogism is that the major premise (1) is not sufficiently established to support the conclusion. The inductive method of reasoning by which the truth of the major premise of a syllogism is reached renders (1) above

as favorable to plaintiff's case as the state of the evidence and the present state of knowledge in medical science will permit. If he had proved that irritation always produces cancer, or usually produces cancer, then the reasoning might be proper, assuming for these purposes the sufficiency of (2). As stated in *Manning v. John Hancock Mutual Life Ins. Co.*, 100 U. S. 693, 25 L. ed. 763:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote."

The trial judge permitted the jury to determine what kind of irritation produces cancer although the evidence failed to give the jury any basis upon which to determine that fact and failed to give it any opinion that defendant's conduct caused it. The court stated his opinion as follows: (App. 62)

"It is a matter for the jury to decide whether the doctor's treatment, the type of treatment produced friction *to such an extent as to cause cancer.*" (Italics supplied)

It is submitted that this reasoning is erroneous because of the insufficiency of the evidence.

In *Christie v. Callahan*, 75 U. S. App. D. C. 133, 124 F. (2d) 825, the evidence of causation, although slight and considered by the dissenting justice as less than a scintilla, contained much more on the issue of causation than is found in this case. In that case there was an admission by the defendant that he had caused the injury, there was testimony from all the experts that necrosis often results from excessive use of x-ray, and there was the positive testimony of one expert that "it (plaintiff's injury) was caused by an x-ray burn". Where is there such testimony here? Does any expert say that the treatment given plaintiff by

defendant caused or probably caused plaintiff's cancer? Does any expert say that irritation caused or probably caused plaintiff's cancer? The most they say is that there is a theory that irritation occasionally causes cancer, although more often it does not, and to the specific question as to what caused plaintiff's cancer, each expert stated he did not know.

The following language approved by this court in *Levy v. Vaughn*, 42 App. D. C., 146, is extremely pertinent to the plaintiff's evidence in this case:

"What does the evidence establish in this case? The evidence, at the most establishes that nobody is certain that the death did result by reason of the use of ether. That is established beyond the peradventure of a doubt. A great many of these witnesses, Dr. Vaughn among them, say that it may or it may not have; he cannot say; . . . . There is no evidence in the case to show, and nobody says, that he died from the ether. There are a great many of the defendant's witnesses who say that if they had known the condition of this man's heart, they would not have administered the ether, but that does not mean that it therefore follows because they did administer the ether it was the cause of his death . . . .

Therefore, with the fact staring you in the face that nobody says to this jury that this intestate died from the effects of the ether, is it possible that the jury can say what the expert witnesses and all other witnesses in the case say that they cannot tell? Does the law mean that a jury can pass upon the cause of the death of a man, when those who ought to know cannot tell? The plaintiff's witnesses have said exactly the same thing that the witnesses for the defendant have said. Then, when all the witnesses concur in the statement that they cannot tell, on what theory of law can the court submit to a jury of twelve men unlearned in the sciences, the question of determining as to condition, when the experts themselves cannot tell?

It seems to me there is nothing else in this case. It is absolutely overwhelming, and, to my mind, it is absolutely conclusive of this question."

The case of *Matuschka v. Murphy*, 173 Wis. 484, 180 N. W. 821, contained facts which are quite similar to those found in this case. The court there said:

"Which was the cause of the ultimate results cannot be told with any degree of certainty. While the experts differed as to the probability of the efficient cause, they conceded the possibility of any one of several causes. Where we have a result which may be attributable to one of two causes, it is not surprising that experts will differ as to the real cause . . . It emphasizes the fact, however, that any conclusion with reference thereto is mere conjecture and falls far short of that certainty which the law requires for the support of verdicts."

The plaintiff herein asserted and had the burden of proving that defendant's negligence caused his cancer. The defendant asserted that plaintiff's cancer was present before he first saw the plaintiff, and that nothing the defendant did caused this condition. The trial court repeatedly asserted that evidence of causation here was slight (App. 58, 59, 61, 345). He also stated, "I will submit the issue to the jury, and if I am wrong and there is a verdict rendered for the plaintiff, the Court of Appeals may very well correct it." (App. 60)

It is accordingly urged that trial court erred in permitting the jury to speculate whether defendant's conduct caused the cancer.

Without more, the judgment below should be reversed by applying the well established principle that where several grounds of liability are charged and there is a general verdict, a new trial must be ordered if the verdict on any of the grounds is not justified. As stated in *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 F. 522, 530:

"It was therefore the right of each party to have the jury correctly instructed respecting each of the claimed acts of negligence the same as if the right of recovery rested upon it alone; and if there was material error in the instructions given or refused respecting either

charge of negligence, the verdict, being general, cannot stand."

## II.

**There was not sufficient evidence of Defendant's negligence to warrant submission of the case to the jury.**

Apart from the lack of evidence on causation, which is in itself sufficient to warrant a reversal, it is submitted that there is also a lack of sufficient evidence tending to show that defendant was negligent, and on this ground also the judgment below should be reversed.

With respect to what negligence was shown on the part of this defendant, it should be borne in mind that, in malpractice cases, evidence of negligence, as well as causation, must depend in great measure on expert testimony. The opinion of experts is necessary to show that the defendant was negligent and that his conduct failed to measure up to that which would have been followed by an ordinary practitioner in the same general locality.

As stated in *I* above, there are only three possible grounds on which defendant's negligence could be based: (1) failure to diagnose plaintiff's cancer; (2) the application of Metaphen to it; and (3) making and furnishing plaintiff with faulty dental plates.

As to the first ground, we have the testimony of Dr. Kossow, who, it is reiterated, is only a general practitioner and does not specialize in or treat cancer. He stated that external cancers are simple to diagnose (App. 26); the average doctor is qualified to diagnose it (App. 26); the tongue is a common site of cancer (App. 31); and when he first saw plaintiff, his cancer must have been apparent for several months and a physician would have recognized it sooner. (App. 31) He admitted on cross examination that one cannot be sure that cancer is present without a biopsy (App. 34).

Dr. Hunter, who knows a great deal more about cancer than Dr. Kossow, would not confirm the latter's statement that "external cancers are simple to diagnose". He stated



that "We cannot ordinarily make a diagnosis by just look-at it, however. It requires the removal of a piece of the tissue and looking at it under a microscope; then you can definitely tell. Many ulcers, or many lesions look like cancer and prove to be something else" . . . (App. 39). He then stated cancer takes time to develop—three months or more. (App. 40) When asked how long the cancer was discernible or apparent, Dr. Hunter stated: "Well, at the time I saw it, I couldn't say how long it had been discernible beforehand." (App. 40).

Dr. Catlin, the cancer specialist, when asked when the plaintiff's cancerous condition would first have been noticeable, answered "I do not know." (App. 44).

Dr. Lynch, who specializes in diseases of the mouth, and who is also more familiar with such diseases than Dr. Kosow, testified that a chronic irritation over a prolonged period of time would produce hypertrophied tissue, which is, over-production of cells in the area. He then said: "Not necessarily is it cancerous, because we see a tremendous amount of that kind of thing in the mouth, especially from ill-fitting dentures". (App. 50) Dr. Lynch later said that he has waited as long as six months before making a clinical diagnosis of a lesion in a patient's mouth (App. 50), and in answer to the following question: "Now, on direct examination, I believe that you said that you did not think the usual dentist or the usual physician was capable of actually diagnosing cancer?", the doctor replied: "Not unless it is a class book picture, even—I mean in the incipency, I don't think that the average physician is capable of diagnosing it clinically, and I don't believe the expert, without doing a biopsy. In fact, I think they are not." (App. 50).

The law is well settled that a physician does not insure the correctness of his diagnosis, and that he is not liable for an honest error or mistake in judgment. As stated in *Duckworth v. Bennett*, 320 Pa. 47, 181 A. 558, 559:

"Where the most that the case discloses is an error of judgment on the surgeon's part, there is no liability.

Williams v. Le Bar, 141 Pa. 149, 159, 21 A 525. Here, the doctor used his skilful fingers and trained observation to detect what was wrong. Neither court nor jury would be competent to set up an opinion counter to his, unless much more was shown than here appears. At most, all that could be said is that defendant had made a mistake in diagnosis where the symptoms were obscure, and for this there is no liability."

With respect to the Metaphen, there is no testimony from any expert witness that the application of Metaphen, in itself, was negligent. Dr. Kossow's testimony, when asked about the Metaphen, is to the effect that an ordinary doctor would not have treated the lesion with any medication over a nine months' period, but instead would have sent the patient for a laboratory examination sooner. But this involves diagnosis, not treatment, and, as shown, was not improper handling.

As to the plaintiff's principal contention, that ill-fitting dentures made by defendant irritated plaintiff's tongue, *there is no expert testimony in the case that the dentures were ill-fitting or improperly made.* Only the plaintiff testified that the dentures did not fit comfortably, but his testimony is not sufficient to charge defendant with negligence in this respect, particularly in the light of Dr. Lynch's testimony about dental plates. (App. 48) On the contrary, the record shows that defendant did everything he could to eliminate any possible friction to the plaintiff's tongue that might have been caused by the dentures—even perfectly fitting dentures. In making the first set of dentures the plaintiff admitted that the defendant put the prong on the side away from the tongue lesion; (App. 21) that the dentures did not have any particular sharp points or prongs; (App. 14) that the defendant filed the teeth several times to eliminate any possible friction; and that when the defendant made the second set of dentures, the false teeth on the left side were eliminated. Rather than showing negligence, the above shows that the defendant did

all that he could not to irritate the plaintiff's tongue lesion, and there is no expert who says that this did not constitute reasonable care. As a matter of fact, the testimony of Dr. Lynch, the oral surgeon, proves that the defendant did everything regarding the dentures that an ordinary dentist in the vicinity would have done.

The jury, therefore, should not have been permitted to speculate as to negligence, and a verdict should have been directed for the defendant, irrespective of the principal insufficiency of the evidence on the issue of causation.

### III.

**There was not sufficient evidence warranting submission to the jury of the issue that the Defendant aggravated Plaintiff's cancer.**

Referring again to the three grounds on which defendant's negligence was based, we first determine what evidence was submitted to prove that plaintiff's cancer was aggravated by defendant's failure to diagnose it so as to have proper treatment instituted earlier.

Dr. Kossov stated that if the plaintiff's cancer had been detected earlier, deep X-ray therapy *might* have been sufficient to cure it, and the plaintiff would have had less disability and prolonged his life expectancy. (App. 32) He later stated that earlier diagnosis may have eliminated the necessity for the surgery plaintiff underwent (App. 32), and that the plaintiff's chances for complete recovery would have been much better if his cancer had been diagnosed sooner. (App. 32)

When asked what advantages there would have been in detecting and treating plaintiff's condition earlier, Dr. Hunter said, "Well, that goes into the realm of speculation, your Honor, don't you think so?" (App. 40). He then said "the earlier cancer is discovered, and the more radical the treatment that is instituted, the greater are *possibilities* the individual has of effecting a possible cure. I say a possible

cure because we are not at all sure that we have completely found the cure of cancer, we base our cures on years of longevity, five years, ten years, fifteen years, or twenty years." (App. 40). The doctor later said "the percentage of cures, as we are able to recognize them, is very small". (App. 42).

Dr. Catlin, the cancer specialist, did not testify on this important phase of plaintiff's case.

Dr. Lynch, the oral surgeon, stated merely that he has seen what he thought were cured cancer patients.

It is believed that this testimony was not legally sufficient to warrant submission of the issue of aggravation to the jury. There was no evidence to show that earlier diagnosis and treatment would have changed plaintiff's present condition, and therefore, defendant's failure to diagnose plaintiff's condition did not aggravate it.

In *Peltola v. Whiting*, 132 F. (2d) 857, wherein a directed verdict for the defendant was affirmed, the court said:

"But there is an even more fundamental reason why the judge was right. Even though the jury had been justified in assuming, not only that the treatment was careless, but the "dental manipulation" had in fact caused the abscess, and that the patient did not therefore get the treatment he should have had, there was no testimony whatever that the right treatment would have saved him. Feldman was extremely honest and guarded in what he said; the farthest he would go was that proper treatment "might" have stopped the spread of infection, and that it might not. The infection may have been one of those malignant ones of which no treatment will stop the spread. There was therefore, for both these reasons no testimony to support a verdict, and no verdict should have been taken."

Also, in *Moore v. Tremelling*, 78 F. (2d) 821, the court said:

"Moreover, even if we assume that both the initial treatment and the subsequent care of the plaintiff were negligent, there is a fatal defect in the proof because it

is not shown that proper treatment would have produced a better result. Such evidence is essential in a malpractice case where two causes are cooperating to produce the final result,—one, the fracture of the bone with the attendant injuries, and the other, the improper treatment. The burden is upon the plaintiff in a malpractice case to prove that the injuries he complains of resulted from the latter cause and not the former. The jury cannot be permitted to speculate upon the relative amount of injury due to the fracture and that due to the malpractice. There must be some evidence to distinguish the injury due to the fracture and that due to appellant's negligence. It cannot be assumed that, in the absence of malpractice the result would have been better, it must be shown by the evidence of expert witnesses."

In *Connellan v. Coffey*, 122 Conn. 136, 187 A. 901, the court stated:

"The plaintiff's main contention is that the nature of the proof of causation in malpractice cases is peculiar and exceptional and that recovery should be allowed if the negligence or unskillfulness of the defendant 'deprived the plaintiff of the chances of a better recovery presumed to flow from proper treatment', and that the jury should have been so instructed . . ."

"In *Green vs. Stone*, 119 Conn. 300, 306, 176 A. 123, 125, a malpractice case in which the testimony went no farther than to indicate that earlier treatment of the plaintiff by the defendant 'might have been beneficial', we held the trial court to have been justified in setting aside a plaintiff's verdict because, on that state of evidence, 'the jury were left purely to speculation as to whether the conduct of the defendant was a cause of the plaintiff's subsequent condition.' Our statement in that connection that in order to support a verdict it was incumbent upon the plaintiff to produce testimony to the effect that earlier treatment 'with reasonable probability would have aided the patient', is not to be construed as meaning, as the present plaintiff claims, that such duty would be complied with if the evidence indicated that 'the chance for a better



recovery' would have been improved by a different method of treatment. This, equally, would relegate to the realm of speculation the question whether or not fault of the defendant was a cause of the conditions for which damage is sought."

In *Thompson v. Anderson*, 217 Iowa 1186, 252 N. W. 117, the court said:

"Appellant places considerable stress upon that portion of Dr. Walsh's testimony in which he states that the death rate in cases of tetanus, where the wound is properly taken care of and antitetanic serum given, is about one in four. The mere statement that a certain percentage of these cases show a recovery *can be of no value to appellant, without further evidence tending to place this case in the number of those where recovery takes place.*

"... In our opinion, the evidence of the expert witnesses not only fails to show any probability that the death of appellant's decedent would not have resulted from tetanus, regardless of any negligence or malpractice on the part of the appellee, but it unmistakably establishes that any attempt to show that such death was caused by any act or omission to act on the part of appellee instead of by the disease from which she was suffering, would be pure speculation and conjecture. If the attempt to thus fix the cause of the death of appellant's decedent would be speculation and conjecture on the part of experts themselves, it must be clear beyond all doubt that the question of the cause of such death should not be submitted to a jury."  
(Italics supplied)

With respect to the second ground on which negligence is based, there is no substantial testimony that the application of Metaphen would aggravate a cancerous condition. The only evidence in the record bearing on this point is the statement of Dr. Hunter that Metaphen continuously applied to tissues may produce *some* irritation. (App. 41) This witness also stated he saw no evidence of irritation caused by external factors (App. 39), and that he saw

nothing in the patient's mouth which indicated that something had been used on it which aggravated the cancerous condition. (App. 43).

The above evidence is certainly insufficient to show aggravation in any degree. The plaintiff himself stated that the Metaphen aggravated his tongue lesion, but here again the issue was a subject for expert opinion, of which there is none.

As to the third ground of negligence alleged to have aggravated plaintiff's cancer, i.e., ill-fitting dentures, it is submitted that the jury should not have been permitted to consider aggravation of the plaintiff's tongue lesion through ill-fitting dentures unless expert testimony first showed that the dentures were ill-fitting and improperly made. In the absence of the latter, as shown in Sec. II above, there is no basis upon which the jury was permitted to speculate as to whether defendant's conduct aggravated plaintiff's cancer.

#### IV.

**The Court erred in permitting expert opinion to be based on improper questions.**

1. The following question was submitted to Dr. Kossow, the general practitioner, over defendant's objection: (App. 30)

"Assuming, Doctor, that Mr. Sternal wore false teeth that rubbed and irritated this lesion on his tongue from October through May, prior to your seeing him. In your opinion, would it have been a skillful or an unskillful practice for an ordinary practicing physician, in this vicinity, to have insisted that Mr. Sternal wear such teeth constantly during that period?"

\* \* \* \* \*

THE WITNESS: "Assuming that—I would say it was unskillful".

BY MR. FEGAN:

Q. "And why?"

A. "If that is what you want to know."

Q. "Why, in your opinion, would such advice be unskillful?"

A. "Well, you are assuming that a dental plate acted as a constant irritant, and there the idea would be to remove the source of irritation. \* \* \*"

The above testimony was improper because it asked what a physician would have advised, whereas the test involved is the standard of skill used by dentists.

As the Court first indicated in considering the propriety of this question (App. 30), dentistry is a specialized branch of medicine, and was probably the first specialty so recognized. It is doubtful whether general practitioners are ever called upon specifically to give advice regarding teeth, much less to advise the use or non-use of false teeth. This is advice exclusively within the province of dentistry, and this witness should not have been asked what a doctor would do regarding a condition with which a doctor is rarely confronted.

It may be true, as plaintiff contended, that if the defendant claimed to possess the skill of a physician with respect to curing the plaintiff's tongue, he should be held to the duty required of a physician in that regard, but whether or not he should have insisted the plaintiff wear false teeth is a question of good dentistry, not of general medicine.

It is also submitted that this witness was not qualified to give an opinion on this question. Dentists specialize in the fitting of false teeth. They are completely cognizant of the symptoms and complaints attendant upon the wearing of dentures, and for purposes of expert testimony, it is submitted that they are the only judges of how or why a dental plate is a source of irritation to a patient, and whether it should be worn under certain circumstances. Dr. Lynch, the oral surgeon, made this clear. (App. 48, 49)

As stated in *20 Am. Jur.* 659, 660:

"When a witness is offered as an expert upon a matter in issue, his competency, with respect to special skill or experience, is to be determined by the court as a ques-

tion preliminary to the admission of his testimony. There should be a finding by the court, in the absence of an admission or a waiver by the adverse party that the witness is qualified; and since there is no presumption that a witness is competent to give an opinion, it is incumbent upon the party offering the witness to show that the latter possesses the necessary learning, knowledge, skill, or practical experience to enable him to give opinion testimony."

This question was objected to on the ground that the doctor was not qualified to answer it. In view of the lack of previous testimony showing any special skill or experience of this doctor concerning dentures, the court was not warranted in permitting him to answer it, and in view of his later testimony the court should have instructed the jury to disregard it.

Dr. Kossow is not a dentist and, in fact, as shown by the testimony, knows very little of dentistry. On cross examination he was asked: (App. 35)

"How many plates have you ever examined, Doctor," and he replied "I don't examine dentures, I just look at them." He was then asked, "You couldn't tell then, whether they were ill-fitted or not?" and he answered, "I could not, no sir, not by looking at them." Later, when the witness was asked to look at the denture and to state whether he found anything unusual about it, plaintiff's own counsel said (App. 36) "If your Honor please, I don't think that the physician is qualified to answer the question."

*If the witness was not qualified to state whether the dental plates were faulty, it is submitted that he was not qualified to state whether it would be skillful or unskillful to allow the patient to wear them.*

As was shown by the testimony of the only expert witness dentist who testified in the case, there is a higher percentage of dentures which are ill fitting than are fitting, and many patients complain of the manner in which they fit or irritate their mouths. (App. 48) It would, therefore, seem that only a dentist experienced in the use and fitting of dental

plates, and fully acquainted with the facts related by a particular patient would be in a position to answer a hypothetical question as to whether it would be skillful or unskillful to allow a patient to wear certain dentures.

This question and answer were crucial to the plaintiff's case and were extremely damaging to the rights of the defendant. One of the grounds on which defendant's negligence was based was that he required the plaintiff to wear the dental plate he had made for him, and that these plates either caused or aggravated a cancerous condition of plaintiff's tongue. To permit this witness to state that the defendant's conduct in this respect was an unskillful practice, practically insured a finding of negligence on the part of this defendant.

2. The following questions seeking Dr. Kossow's opinion were asked: (App. 31)

"When you first saw Mr. Sternal's condition, what was your opinion, based upon *your experience and other facts that you observed*, with respect to whether or not Mr. Sternal had been given the care and attention (of a physician) ordinary employed by a physician of ordinary skill and ability in the District of Columbia?"

A. "No, sir, he was not given the care and attention of a physician in the District of Columbia."

Q. "And why do you say that he had not been given such care and skill?"

A. "Because I think any physician in the District of Columbia would have detected that thing much earlier and would have taken steps to institute treatment much earlier."

There is no precedent in malpractice cases permitting such question to be asked. It has absolutely no factual basis other than "your experience, and other facts that you observed." The obvious objection to the question is that it sought an opinion from an alleged expert on facts which were undisclosed and which, perhaps, were wholly inadmissible. What is the witness' experience and what facts did he observe? It would be a rare physician that could tell by



merely looking at a man what doctor he had been to, how long the doctor had treated him, what the doctor had or had not done, and, especially, whether that doctor's treatment was in accordance with that ordinarily employed by a physician in the District of Columbia.

Expert opinion must be preceded by assumed facts which coincide with the evidence. As stated in *United States v. American Tobacco Co.*, 39 F. Supp. 957:

"Before an expert opinion resting upon a hypothetical basis may be received as evidence, the facts constituting the basis of the opinion must be disclosed and their existence supported by evidence."

See also: *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73.

Further, as stated in *Erie R. Co. v. Linnekogel*, 248 F. 389, "a hypothetical question must rest upon facts in evidence at the time the question is put."

Here, no facts at all are related in the question, or given by the witness in his answer, and the jury has absolutely no way of knowing what was in the doctor's mind when he answered the question; what he thought the defendant had or had not done; whether he thought the defendant had been treating the plaintiff for ten months or ten days; what had been told to him as hearsay by many people other than the plaintiff; whether he was informed the defendant had applied carbolic acid to the plaintiff's tongue; and other facts—ad infinitum. Several leading cases have been found in which the courts have held questions similar to the above, given with more factual support, to be improper.

In the case of *Raub v. Carpenter*, 187 U. S. 158; 47 L. ed. 119, 120, the Supreme Court said:

"He was then asked the following question: 'Doctor, have you formed any opinion from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all you know about him yourself, what his condition of mind was?'"

"To that portion of the question which called for an opinion from the witness from 'all that you know about

him yourself,' the caveatees objected on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in this particular should be first adduced. The court sustained the objection and caveators preserved an exception.

"We agree with the court of appeals that the trial court did not err in holding that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly, the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence."

In the case of *United States v. Burns*, 69 F. (2d) 636, 638, the court reviewed a hypothetical question propounded by the trial court, to the following effect:

"The condition that you find now, and the history of his case, taking all into consideration, can you give us an opinion as to whether he was totally disabled in November, 1920, when he was discharged from the hospital and sent to Florida". The witness answered: 'In my opinion I think that man was totally disabled at that time.' On his cross-examination the witness stated: 'My testimony or opinion that he was totally disabled when he was discharged from the Army is based upon my examination and the record that he had in the Walter Reed Hospital.' The reviewing court said: 'The above-mentioned statement by Dr. McRea of his opinion that appellee was totally disabled when he was discharged from the hospital and sent to Florida was devoid of probative value. The testimony of the witness shows that his opinion was based solely on what appellee told him a few days prior to the trial as to his injuries and bodily ailments, and on the record he had in the Walter Reed Hospital. \* \* \* A basis of the stated opinion of the witness was a history of appellee's case which did not disclose facts which constituted a material part of the history of that case disclosed by evidence before the jury.'"

In the case of *Peters v. Mutual Life Ins. Co. of New York*, 107 F. (2d) 9, the following question was asked:

"Doctor, I believe you testified that basing your opinion on the examinations you made of Harry Peters and of the history of the case which you got from him, you were able to form a medical opinion as to when his heart condition first began, did you not? I did . . . At least two years prior to my first visit in July, 1932."

The Court said, with reference to the above testimony:

"It is plain that no amount of expertness will enable the jury to accomplish the impossible and draw an inference from an unknown fact. This logical impasse has led to the rule requiring disclosure of the data from which an expert opinion is formed. The text books and law reviews put it this way:

" 'The expert must give to the jury the facts upon which his opinion is based, so that the court and the jury may determine whether the alleged facts are real and justify his conclusions.' Lawson, Exp. & Op. Ev., p. 163."

" 'If the expert were permitted to express his general views without indicating the facts upon which they are based, he would be usurping the function of the jury for to accept the opinion, the jury must accept as found all the facts underlying it.' Steinbrink, The Medical Witness, 6 Brooklyn Law Review 155."

In the case of *Foster v. Fidelity & Casualty Co. of New York*, 99 Wis. 447, 75 N. W. 69, the Court said:

"Dr. Turner, the physician who treated the deceased, was asked the following question upon his direct examination, 'State now whether, in your judgment, his death was occasioned by those injuries, from all the evidence you had before you there at the time.' An objection to the question was overruled, and he answered the question affirmatively. This was error, because the question does not show the facts upon which his opinion was based. It may be that it was based largely upon hearsay. Indeed, his further examination tended to show that such was the fact. Such an opinion should

be based either on his examination of the case or upon a proper hypothetical question, and not upon a question which allows the witness to base his answer upon his own idea of what is evidence and what is not evidence."

Thus, again, an improper question and answer were received which were vital to the plaintiff's case and highly prejudicial to the defendant.

3. A third question asked of Dr. Kossow was: (App. 32, 33, 34)

"Doctor, I shall recite to you a hypothetical case and after I recite that hypothetical case I am going to ask you some questions on it, so I will go very slowly.

A man 68 years of age was in good health, except that several years previously he suffered from coronary thrombosis. A rough edge appeared on his false teeth and scratched his tongue. Approximately six weeks later he had impressions taken for a new set of teeth. The scratch was then small, about the size of a match head, hardly noticeable, and lightly red around the edges. A new set of teeth was made, with teeth adjacent to the cut, which rubbed against the cut for a period of nine months. By the fourth month the cut was about the size of the eraser on a pencil. By the sixth month, the cut was inflamed, sensitive and about the size of your little finger. A lump was appearing around the lesion.

By the tenth month, there was considerable pain and a large lump. The irritated area was about the size of the ordinary postage stamp, or rather, the thumb tip of your thumb, and was developing a strang coloration. The patient suffered severe headaches and fever. In the eleventh month, the patient was in the same condition as Mr. Sternal when you first saw him. From the second through the eleventh month the patient was advised to and did apply Metaphen over the area on his tongue, three times a day. No other treatment was given.

I would like to ask you some questions on this hypothetical case.

The patient was advised that a physician could do no more for him than was being done by the treatment that I have described. What is your opinion with respect to the accuracy of that advice?

Mr. Cummins: I object to that, if your Honor please.

The Court: Overruled.

Mr. Cummins: Exception.

The Court: Answer, witness.

The Witness: The opinion is that the advice was inaccurate, it was wrong.

Q. Why do you consider it wrong, Doctor?

A. Because the doctor would not have treated a man with Metaphen all that time. He would not have done the thing you said.

Q. In what respect would he have treated it differently, Doctor?

A. First of all, he would have made a diagnosis much earlier, substantiated the diagnosis earlier by laboratory findings. He would have sent the patient for treatment much earlier.

Q. On the basis of these facts, approximately how much earlier?

A. You are saying that the initial lesion appeared approximately nine months, according to the hypothetical question?

Q. That is correct.

A. The doctor would have detected it nine months ago, as soon as he saw the first little nick on the tongue. He would have begun to suspect it."

An essential of expert testimony in this type of case is lacking in the above line of testimony, and that is, whether or not the treatment specified was in accordance with the standard of care exercised by physicians of ordinary skill in the District of Columbia. As stated in *Carson v. Jackson*, 52 App. D. C. 55, 281 F. 411:

"But here it was necessary that the experts should tell the jury the essential thing, namely, whether or not the defendant's treatment of the plaintiff satisfied the standards of care observed by surgeons of ordinary



skill in the District. If they simply answered, as suggested by appellant, that the treatment was improper or unskillful, they would not have gone far enough. The jury would still be in the dark as to whether or not the treatment was in accordance with the standards just mentioned."

And in *Hazen v. Mullen*, 59 App. D. C. 5, 32 F. (2d) 394, the Court said:

"A case of malpractice cannot be proven by the testimony of a few physicians or surgeons that they would have used some other treatment than the one used, in the absence of testimony from which it can be inferred that the defendant failed to give to the case that skill and care ordinarily possessed and exercised by others in the profession."

Here the witness was permitted to state that the defendant's advice to the plaintiff was inaccurate and wrong, but he does not say that an ordinary physician in the District of Columbia would not have advised or given this treatment. The jury, therefore, is left to its own conclusion that no ordinary doctor in this vicinity would have given such treatment under the circumstances, when they have no testimony to substantiate this belief. In the absence of this essential the jury was permitted to speculate on another ground vital to the plaintiff's case and fatal to the defendant, i.e. that the plaintiff's treatment would not have been employed by an ordinary practicing physician in this community. This question and answer, without more, should not have been permitted to be considered by the jury and its admission should be reversible error.

4. The following question was propounded to Dr. Hunter, the pathologist: (App. 41)

"Would, in your opinion, an ordinary physician practicing in the District of Columbia be skillful in the treatment of a cancer of the tongue if he prescribed only the daily application of Metaphen to the cancerous area, probed occasionally, and did nothing more for a period of nine months?"

A. "That is a question, whether the individual knew he had a cancer."

Q. "What would be your answer if all the elements of the diagnosis of cancer were present, staring the individual in the face?"

A. "Then, it would be my opinion that the patient should have had radical treatment."

Q. "What do you mean by 'radical treatment', doctor?"

A. "By 'radical treatment' we mean surgical treatment and X-ray or radium."

Q. "Those are the accepted methods of treatment of cancer?"

A. "Yes, sir."

The facts stated in this hypothetical question, as it was amended, are completely unfounded and unfair. The error in this question is that it can have but one answer, and that highly prejudicial to the defendant's case. To say to a witness would it be skillful or unskillful to fail to recognize a cancer, a broken leg, pneumonia or any other disease *when all the elements of the diagnosis of these ailments are present* would undoubtedly result in an affirmative reply. But there is no preliminary testimony whatsoever from the witness as to what elements would lead to a diagnosis of cancer, and, most important, this doctor only saw the plaintiff, once, ten months after the defendant allegedly began treating the plaintiff's tongue, and was not furnished any information regarding the appearance and nature of the tongue lesion before, during, and after the time that the defendant should have diagnosed it. At the most, since the doctor was not furnished a history of the case, or given an opportunity to state what elements or facts would lead to a diagnosis of cancer, the only basis for this question would be that the general practitioner, Dr. Kossow, had stated that all the elements were present. However, this would be the same as asking for an expert opinion based on another expert opinion, which is generally recognized as being error. A leading federal case states the rule as follows:

"It is the rule that it is not allowable in asking a hypothetical question to incorporate into it the opinion of

another expert." *Laughlin v. Christensen*, 1 F. (2d) 215.

The answers given to these and other hypothetical questions point strongly to the reason for the jury's verdict.

As stated in *North American Accident Corporation v. Woodson*, 64 F. 689:

"It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven in the trial, or rather that there must be evidence tending to prove them. Otherwise, it is error to allow them to be answered. How can we say that either the answers to the question or the verdict of the jury would have been the same if the statements contained in the question and not proved, had been omitted?"

It is submitted that all four questions were improper and prejudicial to the defendant and constitute reversible error.

## V.

**The evidence was sufficient as a matter of law to show Plaintiff's contributory negligence, and should be a bar to his recovery.**

The defendant's answer (Fifth Defense) alleged contributory negligence on the part of the plaintiff. There is nothing in the record to show that this defense was withdrawn, and the trial court should have submitted that issue to the jury. The fact that the defendant did not submit a request for an instruction on this ground is understandable in view of the following statements made by the court during the consideration of requested instructions:

"The Court: I will not consider a great number of instructions. If you have too many, I won't consider any of them . . . I don't expect to take a great long time reading a large number of instructions.

Mr. Cummins: I might as well . . ."  
(App. 57)

If the evidence given by the plaintiff in this case is believable, then the plaintiff's contributory negligence is so apparent, and so gross that he should be barred from recovery as a matter of law.

The plaintiff's testimony is to the effect that the defendant dentist advised him not to worry about his tongue condition, that he could treat it and cure it as well as a physician. Yet, as the tongue became worse and worse, and as the plaintiff's suffering became greater, and his pain more excruciating over a period of ten months, the plaintiff did absolutely nothing except apply Metaphen antiseptic to his tongue three times a day. He never saw a physician until ten months after the dentist first started to treat his tongue and then, he says, only because of his heart condition.

In *Tanner v. Sanders*, 247 Ky. 90, 56 S. W. (2d) 718, 721, the court had far less evidence of contributory negligence than is contained in this case, and yet stated:

"Another ground submitted for reversal is that the evidence did not justify a contributory negligence instruction. There is little substantial evidence of any contributory negligence by the plaintiff, and his admitted suffering almost from the time his tooth was extracted would negative any inattention on his part. The defendant testified in contradiction of the plaintiff (who said he had visited the doctor's office daily seeking relief and found none), that he had given directions for the treatment of the socket and the relief of his pain, and advised him to return if trouble developed, but the patient did not return for treatment until four days later. This seems sufficient to warrant a conclusion that the plaintiff neglected to care for himself, and the giving of the instruction was not an error."

It is truly incredible that a reasonable person would have suffered what the plaintiff says he suffered, and observed what the plaintiff says he observed about his own condition, without seeing a physician during this ten months' period. Instead he says he relied on the advice of a dentist, whom he knew to be only a dentist, but who, he says,

claimed to possess the knowledge of a doctor. Although a dentist might neglect to tell a patient to see a doctor regarding a condition that was not within his field, it is incredible that any dentist would repeatedly and positively advise a patient not to see a doctor. But, even if this be admitted, it is not believed that anyone, especially an intelligent adult in a learned profession, would let ten months pass by, observing his tongue lesion getting larger and larger, watching it bleed three times a day, whenever he applied Metaphen to it, and yet continue to do just that and nothing else, because a dentist said it was the right thing to do. If, solely, for the sake of this argument, the dentist's lack of treatment caused or aggravated the plaintiff's cancerous condition, it is apparent that the plaintiff's lack of judgment and care for his own health was equally a contributing factor. Everything the plaintiff said made his own negligence more and more apparent, and regardless of the fact that defendant's trial counsel, who is not defendant's counsel on this appeal, failed to submit a prayer to this effect, the trial court should have given such an instruction on his own initiative to best serve the ends of justice.

The court stated in *Feldmann v. Connecticut Mutual Life Ins. Co. of Hartford, Conn.*, 142 F. (2d) 628:

"A mere instruction omission, without a specific request, would of course not ordinarily prompt us to reverse a judgment, but the situation here is one in which we are convinced that the jury was confused and not competently able to determine the proper principle to be applied."

See also: *Swiderski v. Moodenbaugh*, 142 F. (2d) 212.

## VI.

**The Trial Court's charge to the jury was confusing, misleading and erroneous.**

The trial court stated, during the consideration of instructions: "I shall give my usual charge on what is meant by burden of proof, the credibility of witnesses and so forth



and so on". (App. 57) This, of course, made it undesirable and unnecessary for counsel to request any specific language on these subjects.

With respect to burden of proof, the court said only the following (App. 64):

"The burden of proof is upon the plaintiff to show by the greater weight of the evidence, the liability of the defendant under the conditions as to which I have instructed you.

The burden of proof is not a question as to whether there are more witnesses on one side or another as to a particular point. It is whether or not the testimony of *all* witnesses has a greater weight, in your mind, than the testimony of opposing witnesses." (Italics supplied)

\* \* \* \* \*

"On the other hand, if the evidence is equally balanced and you find plaintiff has not sustained the burden of proof *and you find that the defendant was not negligent in his treatment of the plaintiff*, then your verdict should be for the defendant". (App. 65) (Italics supplied)

It is submitted that the above language is erroneous and confusing in several particulars. In the first place, no information is given to the jury as to what is meant by the weight of the evidence, except that it does not mean the party with the most witnesses. This is not sufficient information for a jury to understand the law regarding burden of proof.

With reference to the last paragraph quoted above, the jury is definitely not given the impression that if the evidence is equally balanced, their verdict must be for the defendant. On the contrary, they are told that if the evidence is equally balanced, *and they find the defendant was not negligent*, then they should find for the defendant. This language made it necessary for the jury to find that the defendant was not negligent in order to render a verdict in his favor, regardless of the fact that the plaintiff may not have sustained his burden of proof.

The jury must have been confused by the above instructions. And it is reiterated that there is nothing else in the charge, other than that quoted above, on this subject.

The charge of the trial court also contained the following instruction of the plaintiff granted over defendant's objection (App. 59):

"If you find that two or more causes contributed to the plaintiff's cancer, and you shall find that the defendant is responsible for one or more of these causes, then he is liable to the same extent as though the cancer had been caused by his negligence alone." (App. 60)

It is submitted that there is no basis in the evidence for the above instruction. There was no testimony in the case that there were two or more causes contributing to plaintiff's cancer. Plaintiff's allegations were that defendant either caused or aggravated plaintiff's cancer. With respect to causation he relied solely on evidence that the treatment of defendant, through irritation, caused plaintiff's cancer. He did not claim nor did he prove that defendant's treatment concurred with other factors in causing plaintiff's cancerous condition. The record is devoid of any reason for this charge. This is not a case where two defendants contributed to cause plaintiff's injury, nor is it one in which the evidence showed that two or more causes contributed to plaintiff's injuries.

The only possible ground on which plaintiff could have requested this charge was that the defendant's treatment contributed with plaintiff's tongue lesion in causing the latter's cancer. But the defendant was admittedly not responsible for plaintiff's original tongue lesion, and if the lesion would have become cancerous without defendant's treatment the defendant is not liable.

The law is well settled in malpractice cases that where there are two or more possible causes of an injury, for only one of which defendant is responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the cause for which defendant is responsible.

(*Doumitt v. Deimer*, 144 Oregon 36, 23 P. (2d) 918; *Matuschka v. Murphy*, *supra*).

Therefore, since it was incumbent on plaintiff, to show that the lesion would not have become cancerous without defendant's treatment, he is estopped from claiming that the lesion contributed with the defendant's treatment in causing the cancer.

There being no ground on which this instruction could rest, it was reversible error to so charge the jury. (*Sweeney v. Erving*, 228 U.S. 233, 57 L. ed. 815; *Mitchell v. Potomac Ins. Co.*, 183 U.S. 42, 46 L. ed. 74.)

### CONCLUSION.

It is respectfully submitted that the errors of law hereinabove set forth require a reversal of the judgment below.

The jury was permitted to find that defendant caused plaintiff's cancer when there was no evidence to support it; the jury was allowed to speculate on defendant's negligence, especially when plaintiff's main contention to the effect that defendant furnished him with faulty dentures, had no substantiation whatever in the expert testimony; the jury was permitted to speculate that defendant aggravated plaintiff's cancer when the proof showed that plaintiff's progressively worse condition was due to the inherent nature of his disease. In addition, the jury was confused and misled by erroneous opinion evidence and an improper charge on the law of the case.

This court should also take cognizance of the fact that the actions of the plaintiff during the trial of the case were consistently prejudicial to the defendant, and it was upon such prejudice that the jury returned its verdict for \$30,000. The trial judge on several occasions stated that he was seriously considering declaring a mistrial. The court said at one point:

"I am troubled about this case, because there have been so many instances in which he has violated my instructions. I think you had better take him out, right now, and warn him again, because if this keeps

(up) I am not going to let it go to the jury." (App. 19)

The court should also consider the fact that plaintiff's entire case is based on his unsupported statement that the defendant undertook to treat his tongue lesion and advised him not to see a physician, thus subjecting the defendant to a standard of conduct beyond the periphery of his profession. Without this statement, we feel certain there would have been a defendant's verdict. It is submitted that it is extremely dangerous to permit a member of the medical profession to be liable for substantial damages merely by permitting a patient to allege, without corroborating testimony, that the physician professed to possess greater skill than he held himself out to the public generally to possess. In practically all of the cases wherein a physician is held to a higher degree of skill than he actually possesses, we find that he held himself out to the public generally to possess such skill, not just to an individual patient.

This court has stated the following in *Christie v. Callahan, supra*:

"Hence, in the end, a kind of intuitive evaluation must be made that the verdict does not or would not shock the judicial sense of justice. What may do this varies with circumstances, the nature of the case, respective difficulties of proof, elements of passion or prejudice present, etc."

It is respectfully urged that a revaluation of the judgment below makes it apparent that it is a severe shock to a judicial sense of justice and the judgment therefore should be reversed and remanded with instruction to enter judgment for the defendant.

Respectfully submitted,

ALVIN L. NEWMYER,

DAVID G. BRESS,

ALVIN L. NEWMYER, JR.,

*Attorneys for Appellant.*







# **APPENDIX**



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IN THE  
**United States Court of Appeals**

DISTRICT OF COLUMBIA.

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No. 9593.

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DR. A. P. KASMER, *Appellant*,

v.

PAUL STERNAL, *Appellee*.

---

Appeal from the District Court of the United States for the  
District of Columbia.

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**APPENDIX FOR APPELLANT.**

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**PLEADINGS, DOCKET ENTRIES AND OTHER  
PAPERS.**

362

Filed Nov 27 1946

In the District Court of the United States for the  
District of Columbia

Civil Action No. 34025

PAUL STERNAL, 3125 Adams Mill Road, N. W., Washington,  
D. C., *Plaintiff*,

v.

DR. A. P. KASMER, 2755 Macomb Street, N. W., Washington,  
D. C., *Defendant*.

**Complaint**

1. Plaintiff and defendant are each residents of the District of Columbia. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

2. Defendant is a practicing dentist with offices located at Connecticut Avenue and Macomb Street, N. W., in the City of Washington, D. C. He is not a physician licensed to practice medicine pursuant to chapter 1 of Title 2 of the Code of Laws of the District of Columbia.

3. From on or about September 15, 1944, to on or about July 12, 1945, defendant performed dental services for plaintiff.

4. During the course of such dental services, defendant held himself out as qualified to treat and cure a lesion on plaintiff's tongue and from on or about September 15, 1944, to on or about July 12, 1945, did undertake to cure, relieve, treat and prescribe for the treatment of such lesion.

5. Defendant negligently, recklessly and without due care and skill failed properly to treat or prescribe for such lesion or to detect, diagnose or properly treat a subsequent

malignant and cancerous condition of said lesion and tongue.

6. In the performance of said dental services, defendant negligently, recklessly and without due care or skill, made, fitted, adjusted and prescribed dental plates for plaintiff in such a manner that a cancer of plaintiff's tongue and surrounding areas was caused or aggravated, or both caused and aggravated.

363 7. As a result, plaintiff suffered a severe cancer of the tongue and surrounding areas from which he has not yet fully recovered; was prevented from transacting his business; suffered great pain of body and mind; suffered permanent impairment of speech, hearing and eyesight; suffered permanent disability to pursue gainful employment; and incurred expenses for and incident to medical attention and hospitalization, both of which are still necessarily continuing, in the sum of approximately five thousand dollars (\$5,000).

Wherefore, plaintiff demands judgment against defendant in the sum of fifty-five thousand dollars (\$55,000) and costs.

DAVID A. FEGAN,  
905 American Security Bldg.  
Washington 5, D. C.  
*Counsel for Plaintiff.*

*Of Counsel:*

MORRIS, KIXMILLER & BAAR  
Washington, D. C.

Let this be filed as of this 27th day of November 1947.

JAMES W. MORRIS,  
*Justice.*

\* \* \* \* \*

Filed Apr 22 1946

**Answer of Defendant to Complaint for Negligence****FIRST DEFENSE**

The complaint herein does not state a cause of action against the defendant, Dr. A. P. Kasmer.

**SECOND DEFENSE**

The defendant admits the allegations of paragraphs 1 and 2.

**THIRD DEFENSE**

The defendant admits rendering professional dental services to the plaintiff from September 20, 1944, to and including June 19, 1945, but specifically denies that he knew the plaintiff prior to September 20, 1944, and specifically and emphatically denies that he held himself out as qualified to treat and care for a lesion of plaintiff's tongue or undertake to care, treat or prescribe for a lesion on plaintiff's tongue.

**FOURTH DEFENSE**

The defendant denies each and every allegation contained in paragraph 5; defendant is without knowledge concerning the allegations in paragraph 6 and demands strict proof thereof; defendant denies each and every paragraph not heretofore admitted.

**FIFTH DEFENSE**

The defendant states that if the plaintiff was prevented from transacting his business and suffered great pain of body and mind and incurred expenses for medical attention and hospitalization, that same was caused by and through his own negligence.

Wherefore the premises answered, the defendant prays as follows:

1. That the complaint be dismissed with costs to him.

2. And for such other and further relief as to the Court may seem just and proper.

ELMER E. CUMMINS  
*Attorney for Defendant*  
 1126 Earle Building  
 Washington, D. C.

366

Filed Nov 27 1946

### Pretrial Proceedings

#### Statement of Nature of Case:

This is an action in which the plaintiff seeks to recover damages from the defendant for the alleged negligence of the defendant in treating a lesion on plaintiff's tongue and undertaking to cure the same without being qualified so to do and that he, also, performed certain dental services which caused or aggravated a cancerous condition.

Plaintiff asserts that, as a result, he suffers a severe cancer of the tongue and surrounding areas; was prevented from transacting his business and has suffered permanent impairment of speech, hearing and eyesight; that such injuries are permanent and that he is and will continue to be unable to pursue any gainful employment. Special damages approximate \$5,000.00 of which approximately \$1200.00 is loss of earnings to date, the remaining being hospital, medical and related expense.

The defendant asserts that he was not in any respect negligent; that he did not undertake to treat or cure the lesion on plaintiff's tongue, but, on the contrary, advised him to consult a physician with whom defendant made an arrangement so that plaintiff could obtain an appointment with him.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the follow-

ing stipulations unless modified by the Court to prevent manifest injustice:

It is stipulated that expert witnesses in this case shall be limited to four for each party.

It is stipulated that all hospital records, bills for medical expense pertaining to injuries contained herein may be admitted in evidence without formal proof subject to objection as to relevancy.

It is further stipulated that all depositions taken prior to trial shall be received in evidence without objection except as to relevancy.

Any pertinent records of the defendant may be received in evidence without formal proof.

DAVID A. FEGAN

Date November 27, 1946

*Atty. for Plaintiff*

ELMER E. CUMMINS

JAS. W. MORRIS

*Atty. for Defendant*

*Pretrial Justice*

\* \* \* \* \*

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Filed Jan 31 1947

### **Verdict and Judgment**

This cause having come on for hearing on the 17th day of January, 1947, before the Court and a jury of good and lawful persons of this district, to wit:

William T. Murphy

William P. Streets

Blondell O. Patterson

Delmas W. Peyton

William F. Meggers

Irene E. Henderson

Robert N. Stimmel

Margaret E. Brennan

Pearl E. Parham

Charles H. Henson

Eura L. Turner

Nelson J. Ballard

who, after having been duly sworn to well and truly try the issues between Paul Sternal, plaintiff and Dr. A. P. Kasmer, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 31st day of January, 1947, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the



defendant by reason of the premises is the sum of Thirty thousand (\$30,000.00) dollars.

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Thirty thousand (\$30,000.00) dollars together with costs. Jury polled.

CHARLES E. STEWART, *Clerk*,

By R. PAGE BELEW  
*Deputy Clerk.*

By direction of  
JUSTICE JENNINGS BAILEY.

\* \* \* \* \*

368

Filed Feb 10 1947

**Motion to Set Aside Judgment for the Plaintiff and to Grant Judgment for the Defendant, or in the Alternative, for a New Trial.**

Comes now the defendant, by his attorneys, and moves this Honorable Court to set aside judgment for the plaintiff and to grant judgment for the defendant, or, in the alternative, for a new trial, and as cause therefor, states the following grounds:

1. The verdict of the jury is contrary to the evidence.
2. The verdict of the jury is contrary to the weight of the evidence.
3. The Court erred in the admission and exclusion of evidence.
4. The Court erred in the instruction to the jury.
5. The Court erred in granting plaintiff's prayers for instruction numbered 1, 2, 4, 5, 7 and 10. (5 as modified).
6. The Court erred in failing to read to the jury the prayers granted for the defendant.
7. The Court erred in denying the prayers submitted by the defendant.
8. The Court erred in submitting the case to the jury.
9. The Court erred in overruling defendant's motion to withdraw a juror made several times during the trial.

10. The verdict of the jury is so grossly excessive  
 369 as to evince passion and prejudice on the part of  
 the jury.

11. And for other reasons to be urged at the oral argu-  
 ment.

ELMER E. CUMMINS  
 Earle Bldg.  
 NEWMYER & BRESS

By DAVID G. BRESS  
 1001 - 15th St., N. W.  
 Washington, D. C.  
*Attorneys for Defendant*

\* \* \* \* \*

370

Filed Feb 18 1947

### **Order Overruling Motion for New Trial**

Upon the coming on for hearing of the motion filed herein  
 by Defendant, for a new trial, it is this 18th day of Febru-  
 ary, 1947, ordered that said motion be, and the same is  
 hereby overruled.

CHARLES E. STEWART, *Clerk,*

By R. PAGE BELEW

By direction of

JUSTICE JENNINGS BAILEY

\* \* \* \* \*

371

Filed Apr 15 1947

### **Notice of Appeal**

Notice is hereby given this 15th day of April, 1947, that  
 the Defendant, A. P. Kasmer, hereby appeals to the United  
 States Court of Appeals for the District of Columbia from  
 the judgment of this Court entered on the 31st day of Jan-  
 uary, 1947, in favor of Paul Sternal, plaintiff, against said

defendant, A. P. Kasmer, in the sum of \$30,000, motion for new trial having been overruled on February 18, 1947.

NEWMYER & BRESS

By: DAVID G. BRESS

ELMER E. CUMMINS

*Attorneys for Defendant*

1001 - 15th Street, N. W.

Washington, D. C.

*Atty for Plaintiff*

DAVID A. FEGAN

905 American Security Bldg.

### Memorandum.

May 8 1947

Cost bond on appeal of defendant in amount of \$250.00 with U. S. Fidelity & Guaranty Co. approved and filed.

## II.

### EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

4 Paul Sternal

\* \* \* \* \*

Direct Examination

By Mr. Fegan:

\* \* \* \* \*

Q. You are the plaintiff in this action, Mr. Sternal? A. Sorry.

Q. You are the plaintiff in this action are you not? A. I am.

Q. And how old are you? A. Sixty-nine years old.

Q. What is your occupation or profession? A. I am an accountant by profession.

Q. By whom are you employed? A. By the United States Government, the OPA Agency.

\* \* \* \* \*

9 Q. Mr. Sternal, can you identify these [handing certain objects to the witness]? A. These are my old plates, and it is just about here, these points, these three points that caused the puncture or lesion in the tongue.

\* \* \* \* \*

11 Q. Where was the scratch on your tongue? A. On the left side.

Q. Was the scratch painful? A. Well, it wasn't exactly giving me pleasure; but, it annoyed me quite a bit while speaking and eating.

Q. Now, will you describe this scratch as it was the first time you came to see Dr. Kasmer, that is, on September 15, 1944? A. When I went to see Dr. Kasmer that scratch was about two months old, and it didn't seem to show any tendency of healing up, and it was the size of, let's say, the phosphorus end of a match. By looking very closely into it, or at it you could see a slightly—the raw flesh appearing through that puncture. It was a slight,—we might call it—a scratch.

\* \* \* \* \*

12 Q. Recall, if you will, what was said by you and Dr. Kasmer respecting this prong on your original dentures. A. In coming to Dr. Kasmer and telling him my troubles and the reason why I came to him, he naturally examined my entire oral cavity, looked particularly at my tongue from all sides, even down to the throat, probed the tongue, especially after the place where the lesion was, and he finally gave me this opinion:

That the lesion was caused by that prong that we were just defining, that he just saw; and he told me by no means ever put that lower plate in my mouth again "because that is the cause of your trouble."

\* \* \* \* \*

13 Q. What, if anything, did Dr. Kasmer say respecting your tongue at the time of the first visit? A. He told me, and he said, that—

Q. What did he say? A. Well, he said in effect, “that, I can cure it.” He used the word “cure” or “heal”.

Q. What course of procedure, if any, did he suggest or advise? A. He told me, to cure this trouble, it would  
14 be necessary first to remove the cause, which he would attend to by giving me a new set of teeth, false teeth of course; and, for me to attend to the following:

He gave me a prescription which consisted of a medication which I never heard of before, but he put it down on a piece of paper, and this medicine, the name of that is Metaphen, and he told me how to apply it, went into detail as to how to make a swab from a match, put the cotton on one end, soak that in that Metaphen, and put that right into that scratch or that wound of the tongue. He said, “it will smart, it will hurt, but just stand the pain, and when you are through drenching that inner part of your wound, put that Metaphen all over the tongue, and do that three times a day, besides your other ablutions with the salt water, or a solution of aspirin that you occasionally take during the day.”

\* \* \* \* \*

16 Q. Now, what conversations, if any, did you have during your first visit, respecting the condition of your tongue? A. What conversations I had?

Q. With Dr. Kasmer. A. When he told me what his method of curing my trouble would be, or what they are, I asked him if it wouldn't be advisable to ascertain definitely from another physician, or from a clinical laboratory what the nature of this wound in the tongue really was, so that we knew what we were doing. He poo-pooed that. He said, “there is nothing serious about this tongue, there is nothing that a physician could do there but what I can't possibly attend to,” and he proceeded to give me the ways and means of how to cure my trouble.

\* \* \* \* \*

19 Q. And what trouble did you have from those plates? A. They were too tight, they were giving me endless trouble in my gums. I couldn't wear them any longer than at the most six hours at a time. He wanted me to wear them day and night, which I couldn't do. Besides the pain in my tongue, I was getting insane from pain by the time,—at the end of October and November.

\* \* \* \* \*

23 Q. Well, now if these teeth were inserted in your mouth, when were these teeth inserted in your mouth, that is the first set of false teeth,—when were they inserted into your mouth? A. The lower plates were ready for adjustment by the end of October, as I recollect. The uppers, were finished somewhat later,—I think they—that was not ready for further adjustment until the end of November.

Q. Why was it necessary for you to return so often to see Dr. Kasmer? A. The difficulty I had in wearing those teeth, as I said before, I could only wear them, at the most, six hours at a time, and then I had to yank them out because I had to look out for my cardiac condition, and for that reason, he could never finish the first set and when he realized that even the set that he made for me were rubbing against my tongue and keeping the wound open, he finally propositioned me to have another set of teeth made for me, for a little less money.

\* \* \* \* \*

24 Q. Now, how frequently during your visits, during the period that you were visiting or being treated by Dr. Kasmer, did you you apply medicine to your tongue yourself? A. Obeying his instructions, I have used this prescription of his, called Metaphen, every day three times, as I said before, with the exception of some time when I was too sick to apply that, because it was increasing my fever, it was taxing my nerves, very much so, or else, when I was traveling, because during all of this time, I was working



and on the train, sometimes I didn't have that Meta-  
 25 phen handy. In such cases, I did not use it, but on  
 all other occasions, I used it religiously, because I  
 was sold on his sincerity and on him knowing what he was  
 doing, so I used it.

Q. Getting back to those 27 visits Mr. Sternal, what were  
 dates of those 27 visits? A. I don't know them by heart,  
 but as far as I can recollect, if I can resort to this list, the  
 first visit was on the 15th of September, 1944; on the 20th  
 of the same month; and also on the 25th; and on October  
 2nd, 9th, 10th, and 11th; on November the 7th, 15th, and  
 29th.

Then I had been sick, in December, and as far as I remem-  
 ber in that month, due to that sick period, I first called him  
 up and then I visited him, to the best of my recollection it  
 was December 21st.

On January, between the 10th, or the 12th, I visited him,  
 I don't know which; and in February, in the period be-  
 tween the 6th and 14th, I have seen him.

March 3rd, and—well, so far as my list goes, from the  
 27th and to the 30th, because I do remember that very well,  
 —in March I had to go to York, Pennsylvania, and prior  
 to going there on the 3rd, I saw him, and after I came back,  
 with a lot of trouble in my mouth, my natural tendency was  
 to get in touch with my dentist and that was between the  
 27th and 30th.

Q. Of what month was that, the 27th? A. That was in  
 March. I was almost the entire month of March in  
 26 in York, Pennsylvania, working under tremendous  
 difficulties. In April, I made at least three visits,  
 probably one each week.

The entire month of May, I couldn't see him because I  
 was busy in Philadelphia and New York, but on June, be-  
 tween the first and the seventh, 16th, and 17th, and 26th, I  
 had made visits to Dr. Kasmer.

\* \* \* \* \*

28 Q. Now, will you describe in detail, if you will, how these dentures irritated your gums? A. Because sir he had the teeth in there, he did not have any particular sharp points or prongs, but the edges of the teeth, both on the uppers, as well as the lowers, were rubbing against my tongue, especially where, by this time, the enlarged wound was, and it gave me untold trouble while speaking and eating. As a matter of fact, while eating I had to take the whole thing out and mash my food with a fork and swallow it that way because I couldn't use those teeth.

\* \* \* \* \*

30 A. Well, he proposed to make another set of teeth, dental plates for me, because the friction still existed with his so far unfinished plates. He proposed to make me a new set of teeth without teeth on the left side.

\* \* \* \* \*

31 Q. This is the first set of teeth that Mr. Kasmer—  
A. Yes, and you can notice on there that he tried to file down the edges.

\* \* \* \* \*

32 Q. When were the impressions taken for this set of teeth? A. I again cannot say on what date, but the impressions were taken in April.

Q. Now, would you describe the steps taken in making this second set of impressions? A. While the first taking of impressions was painful, insofar as I had the wound in the tongue, by the time he made the impressions for the second set of teeth, you must bear in mind that the wound in my tongue was more than twice as large, and very very painful.

\* \* \* \* \*

33 Q. Now, will you identify this set of false teeth?  
A. Well, this is the final end of it. The uppers of the first set was remodeled, and that is the product of that, without the teeth here on the left side [indicating]. That was the final remedy to remove friction, and the lower, he

did not make the teeth on this side in order to remove friction, and make good the promise he made on the first visit, but, they, as they are, were never completed. I could never use them.

\* \* \* \* \*

34 Q. Mr. Sternal, will you describe the development of the condition of your tongue from September 15, when you first saw Dr. Kasmer, till the time this second set of dentures was made? A. I should describe the condition of my—

Q. The development of that condition,—of the sore in the tongue? A. From September 15, 1944, through, that would be April of '45?

Well, as I said before, the first visit that I made to Dr. Kasmer, the tongue had a puncture, or a lesion not greater than the size of the phosphorous end of a match, which would start off very lightly, and the medication applied as per his prescription. Then, the effect of the Metaphen, the effects which the Metaphen had on that sore, as I now see it, was not so satisfactory because the sore was bleeding from time to time, as I was putting that Metaphen on. As a layman, I don't know, I fully had confidence in him, and I just did what he said for me to do, but the sore grew bigger and bigger. By about the end of, or around Novem-

35 ber, or October, around that time it was, it grew to the size of a rubber end of a pencil, if you can visualize that, and a month or two later well, just about a month or a month and a half later, it grew to the size of the top point of my small finger, what I mean by that is—the width of the top of the small finger was the width of the opening in my tongue, at the edge of the tongue; and that grew bigger in time until by June, or by May, rather, it was the same way, in size like the tip of my middle finger; and finally, when I got so terribly sick in June, and I had to go to another doctor, the opening in my tongue was at the edge of it, like the tip of my thumb, the width of my thumb would fit into the width of the opening in the tongue.

Now, that opening in the tongue was wider at its edge, but it went tapering into the middle of the tongue, and the depth of the wound was about, well, as thick as the tongue—any average man's tongue is, and when I made description of the size, I am making these descriptions approximately, I didn't take a calipers and measure the opening of the tongue and apply it to my fingers, and so forth. That is the situation, and by eyesight, and looking at my opening, and trying to find a measure for it.

By Mr. Fegan:

Q. What evidence, if any, of a hardness of your tongue?

A. I noticed it, of course, at that time,—I did not know what hardness of the tongue meant.

36 The Court: That is not the question, whether you knew what it meant.

Repeat your question.

[The record was read by the Reporter.]

The Witness: I noticed that the tongue, that the portion of the tongue behind that sore toward the throat was harder than the rest of it, and I did notice that when I was applying the Metaphen, I noticed that was hard.

By Mr. Fegan:

Q. When was the first time you noticed this hardness?

A. I again cannot definitely pin myself to definite dates, but it was about January.

\* \* \* \* \*

38 Q. At any time during the period September 15, 1944, to the time that Dr. Kasmer made the second set of teeth, did you ever notice any peculiar coloration of the tongue? A. In about November, the appearance certainly seemed to have changed. Temporarily, for a short while, it seemed to me, it seemed that there was a pigment or a dark grey layer of film covering the raw flesh, and it had the appearance as though it would dry up, although you cannot expect to have any drying up in the mouth

where there is plenty of saliva all the time; but, it had that appearance—and, may I go on?

\* \* \* \* \*

42 By Mr. Fegan:

Q. Now, when did you first notice your headaches?

43 A. They came intermittently, from time to time.

Q. Beginning at approximately what date? A. Well, around the end of October, November, when he started,—around that time,—October and November.

\* \* \* \* \*

45 Q. Do you recall what you said and what Dr. Kasmer said on those occasions? A. With respect to what?

Q. To the failure of your tongue to heal? A. Oh, he expressed concern in a general way. I said, "Doctor, you said the tongue would heal up if I continue to use your prescription of Metaphen, which I have been doing to the

46 best of my ability; and, you said you will attend to your end of it by giving me a set of teeth that will not rub against the open wound in the tongue, but that that friction would be eliminated, but we are not making any headway."

Q. And what did Dr. Kasmer say when you said that? A. Well, he made—he said, in effect, that I was thinking too much of my wound in the tongue, that I should forget the tongue, other than do just what he asked me to do in applying the Metaphen,—I should forget the tongue.

\* \* \* \* \*

48 The Witness: I said to him "Don't you think a physician should be consulted to definitely ascertain what is wrong with my tongue?"

By Mr. Fegan:

Q. And what did Dr. Kasmer say in reply to that question? A. He was consistent in his denial of such a necessity.

\* \* \* \* \*

52       The Witness: So, I recalled these things to him and asked him, being a stranger in Washington, I know of no other medical man, physician, would he give me an address, a physician that I could fully rely on and go to him when such symptoms relative to my heart trouble should come on me of a Sunday or a night, when a physician's help would be most needful, and I would need such help in a hurry.

By Mr. Fegan:

Q. What did Dr.—go ahead, continue. A. Well, that isn't the question.

53       Q. What did Dr. Kasmer say? A. And Dr. Kasmer very willingly and obligingly wrote down the name of his own personal physician, and gave it to me.

Q. Did you ever go to see that physician? A. I never did.

\* \* \* \* \*

57       Q. Now, what course of procedure did Dr. Kossow prescribe for your tongue? A. He sent me to Dr. Hunter, the biologist, in Washington.

Q. And what did Dr. Hunter do? A. He took a specimen of my tongue.

\* \* \* \* \*

64       Q. Approximately when, the date, when you came out of Memorial Hospital the first time? A. I had to give up my bed because they were short of beds—

Q. Just the date? A. That was the end of August.

\* \* \* \* \*

66       Q. When was your second visit to Memorial Hospital? A. On September 30, 1946.

Q. When were you released from Memorial Hospital on your second visit? A. November 15th.

Q. Will you describe what was done to you on your second visit to Memorial Hospital? A. I was operated on for cancer cells.

\* \* \* \* \*



A. After preparing me for a major operation,  
 67 which took place on October 8th, they operated on  
 me, so far as I was told afterwards, because I was  
 under anesthetic—

\* \* \* \* \*  
 70 The Court: \* \* \*

I am troubled about this case, because there have  
 71 been so many instances in which he has violated my  
 instructions. I think you had better take him out,  
 right now, and warn him again because if this keeps I am  
 not going to let it go to the Jury.

\* \* \* \* \*  
 74 Cross Examination

By Mr. Cummins:

\* \* \* \* \*  
 75 Q. When was the first time you had an upper den-  
 ture and a partial lower denture in your mouth? A.  
 I should say about since 1920, or so.

Q. So, for 26 years you have worn false teeth in the  
 upper part of your mouth and the lower part of your  
 mouth? A. In the most—yes, that is right.

\* \* \* \* \*  
 76 Q. When did he make those dentures that you were  
 wearing when you first visited Dr. Kasmer? A.  
 1943.

Q. What month, if you recall? A. I think he finished the  
 job around May or June, 1943.

Q. And when you went to Dr. Kasmer, you complained  
 about those ill fitted dentures, did you not? A. That is  
 right.

Q. And how did you suffer with those dentures prior to  
 the time you went to see Dr. Kasmer? A. Well, I first  
 noticed my discomfort when I was in Chicago, that  
 77 I had a puncture in my tongue.

Q. And about what day was that, when you were  
 in Chicago? A. I don't know what day it was, but the date

was around—toward the middle of July—about the 15th or 16th.

Q. About the 15th or 16th of July? A. 1944.

Q. When you first noticed that condition, you noticed it as a result of pain? A. Well, it is discomfort that I had, like you would bite your tongue with your own teeth sometimes, or your lip, that is about the sensation I had.

Q. And when you bit your tongue in that manner, that bite upon the tongue hurts, does it not? A. To a certain extent. To me, it was uncomfortable.

Q. And your tongue continued to hurt from approximately the 15th of July, the 15th or 16th, up until September 20, when you went to see Dr. Kasmer? A. That is right.

79 Q. How large a match do you have reference to when you say, when you went to Dr. Kramer that it was as large as a sulphur end of a match? What type of match do you refer to so we can get the size? A. Well, you can take any match for that matter, the old style wooden match was in my mind.

80 A. It was as large as a pin, when I first discovered it in August.

85 Q. And what did you say about your dentures? A. Well, I did, personally, I, myself, blamed the dentures—

Q. Just a moment. I am not asking for any blame. I am asking what you said to Dr. Kasmer in regard to the dentures that you were then wearing. A. That I thought it was due to the dentures which caused a wound in the tongue.

Q. But you did tell him that your dentures were faulty and asked him to examine them? A. I asked his opinion,

86 what the cause of puncture of the tongue was, and he  
agreed with me that it was caused by faulty den-  
tures.

\* \* \* \* \*

87 Q. Why did you not see some other physician or  
dentist before you saw Dr. Kasmer, if the pain was  
continuous? A. Because I thought this will go away by  
itself, by giving it time and treating it, in my own way.

Q. And you were sure you didn't have medication placed  
on your tongue before you went to see Dr. Kasmer? A.  
No, I didn't; except salt solution of my own.

Q. And—a solution of what? A. Salt.

Q. Salt and what? A. Salt dissolved in water, and I  
washed my mouth with that, and I gargled.

Q. How often did you use that between July 15 and Sep-  
tember 20? A. Every day, after meals.

88 Q. After meals? A. And also in the morning and  
evening.

Q. And did some physician recommend that? A.  
No, I know that from my former dentists, they said any-  
time, they always gave me salt water to rinse my mouth  
with.

Q. Rinse your mouth— A. No—

Q. Did you have sores in your mouth on those different  
occasions? Did you have a sore, or sores in your mouth  
on that occasion? A. When they extracted teeth, they said  
salt is always a good thing to sterilize your mouth with.

\* \* \* \* \*

89 Q. Now, when he made the new denture, he got that  
prong on the other side, did he not? A. He made the  
prong on the other side.

\* \* \* \* \*

91 Q. How long have you had a bad heart condition—  
How long have you had a bad heart condition. A.  
The first symptoms of heart condition occurred to me in  
1942, in April—Yes, April 1942.

Q. And that was a very serious condition in '42, was it not? A. Yes.

94 Q. When did you have your first heart ailment in '44? A. When? About November, I felt the first symptoms of heart trouble coming on.

98 The Witness: On May of last year, having had to be in New York to see Dr. Catlin on my monthly visit for control purposes of cancer, he made a tentative operation on me on this side (indicating) with the idea of arresting those cancer cells that came from the tongue and settled in the glands, and he said that those conditions will probably get more and more aggravated and if I feel a swelling here, the results of the cancer coming from the tongue will there show itself, and then I will have to be taken care of in a surgical way, which really happened.

102 Q. Now, Mr. Sternal, will you tell us what condition your tongue was in when you went to see Dr. Catlin, in New York City. A. It was very sore.

Q. And how large? A. The opening of—the size of that opening in my tongue was about the tip of my thumb, the utmost top of my thumb, that doesn't mean down here, but it means the top of my thumb,—that is the way I described it before, and I want to stick to that.

Q. And how deep in the tongue was that lesion? A. I didn't get the first part of that.

Q. How deep in the tongue, at that time, was the lesion? A. It was quite deep, almost the full depth of the tongue.

104 Q. After you swabbed your tongue, did you rinse your mouth out? A. I wasn't supposed to.

Q. I say, did you, sir? A. No, I didn't.

107 Q. Now, as a matter of fact, is it not true that on June 16, 1945, that was the date that he extracted the second molar? A. That is possible, that is quite probable, very true.

\* \* \* \* \*

108 Q. Now, do you remember going to the doctor on March 3 of 1945 and having the following professional services rendered you as follows:

The cleaning of your teeth, five remaining natural teeth of the lower jaw, and the filling of one tooth? A. Yes, he did that.

\* \* \* \* \*

112 A. By Dr. Kasmer. He said, "Don't put the lower dentures in your mouth, the old one," but he allowed me to use the upper ones until he had his finished, and when I tried to use his dentures, they were so tight that it was impossible for me to keep them in my mouth.

Q. And they were so tight that they hurt your gums, weren't they? A. Also hurt my tongue?

Q. They hurt your gums? A. Hurt my gums and my tongue.

Q. And the reason why you couldn't keep them in any longer than six hours was on account of the gums, was it not, hurt your gums so much A. Yes.

Q. That is true? Couldn't stand them in the mouth because they were too tight? A. That is right.

\* \* \* \* \*

113 By Mr. Cummins:

Q. How many days between October 9th and March 3rd did you not use your teeth at all? A. I didn't could not use them for a certain time, but I don't know on what dates and how long those periods were that I had to leave Dr. Kasmer's dentures out of my mouth.

\* \* \* \* \*

116 The Witness: Some sort of medication he put in my mouth every time that I have been there. What it was, I don't know.

\* \* \* \* \*

117 Q. Now, Mr. Sternal, what was the date when the doctor placed the second upper and partial lower dentures in your mouth? A. To my best recollection, it must have been sometime in April—in April 1945.

\* \* \* \* \*

122 A. Oh, I think probably two or three days, and when I kept on putting the Metaphen on, it started to bleed again.

Q. And did you discontinue Metaphen then? A. No. I wasn't told to discontinue Metaphen, I was told to continue.

Q. The question is, did you discontinue it. A. I did not discontinue it. I continued it until Kossow told me to stop it.

\* \* \* \* \*

123 Q. Now, do you remember having a conversation with Dr. Kasmer during the fall of 1945 with respect— A. '44, you mean?

Q. Yes. With respect to your seeing a physician by the name of Dr. Levitt? A. Dr. who?

Q. Dr. Levitt. A. Yes. I could never remember that name. I did ask him a certain time when I was concerned with my heart condition, as I already testified before, that I was interested in knowing a medical man, a physician, to whom I could appeal whenever an emergency arose due to my heart condition.

\* \* \* \* \*

124 Q. I quote a question, the next question:

“Q. And he called Dr. Levitt? “A. Yes.

“Q. But you never went to see Dr. Levitt, did you? “A. I had no occasion to. At the time I needed a doctor I did not have the name, I misplaced the name, so my landlady sent me to Dr. Kossow.”



Is that right? A. That is right.

125 Q. So, it is your contention that you didn't need a doctor until the following June, and you lost Dr. Levitt's name? A. That is right.

\* \* \* \* \*

130 Q. I just have a few questions this morning, Mr. Sternal.

I noticed in this memorandum, which is typewritten, labelled "Visits to Dr. Kasmer," that you testified yesterday that your last visit to Dr. Kasmer was June 26, 1944. I should have said—1945. A. Yes.

Q. Is that correct? A. It wasn't. It wasn't the last visit. To my best recollection, I made another visit to him after that, but I don't know what date,—sometime in the early part of July.

\* \* \* \* \*

132 Q. Now, on the 25th of June when you went to see Dr. Kossov, didn't he tell you not to go back to Dr.  
133 Kasmer? A. Not on that day.

Q. Didn't he tell you, on that day, not to wear those teeth? A. Yes.

\* \* \* \* \*

139 Q. What is your opinion as to the number of nights between the period you speak of, September to June, that you slept with your dentures in your mouth? A. Probably three or four times.

1 Q. In the entire approximate nine months? A. Yes.

\* \* \* \* \*

141 A. I think an average of wearing these teeth was about two and a half, to three hours, between meals, everyday, and at night, as a rule, I did not wear them.

\* \* \* \* \*

142 Q. I will ask you if you didn't state this, on direct examination, yesterday:

"In November the appearance of my tongue changed temporarily for a short while. The pigment became dark and appeared to be drying."

A. That is what I said, but that was not,—that was my opinion.

Q. That was your opinion? A. Yes.

Q. Your tongue was better in November? A. Not  
143 to my opinion. It looked better, and that is what he claimed.

Q. Looked better to the naked eye? A. Yes.

\* \* \* \* \*  
146

**Dr. Maurice J. Kossow,**

\* \* \* \* \*  
Direct Examination

By Mr. Fegan:

\* \* \* \* \*  
148 Q. In your opinion, do you know more or less about the subject of cancer than does the average skilled practitioner in this vicinity? A. I will say—no more and no less,—about as much.

\* \* \* \* \*  
Q. Approximately how many cases of cancer have you studied, diagnosed or treated? A. Do you mean since I have started?

Q. Since you started. A. Since I was out of school, I would say several hundred, probably two or three hundred.

Q. Doctor, has it been your experience that the diagnosis of cancer is a simple or a complex procedure? A. Now, it is simple, I suppose, in some cases; it is complex in others.

Q. And in which type of case would it be simple? A. If it is easily accessible, if it is an external cancer, I would say it would be simple to diagnose; if it is hidden  
149 entirely, that sort of thing, it may be it would take a little time and study to find it out.

\* \* \* \* \*

152 The glands in his neck were somewhat enlarged, in other words, the kernels, if you want to say it in plain language, were larger and were easily palpable.

\* \* \* \* \*

153 Q. Did you make a diagnosis of Mr. Sternal's condition? A. Yes, sir, I suspected a possible C.A., a possible carcinoma of the tongue, and stopped my examination and didn't continue from then on, and called him into the office and told him I wanted him to go to Dr. Hunter's laboratory—he is a pathologist in the city—on the following day, and I told him I wanted a biopsy, where they snip a small piece off that lesion, so he could examine it under the microscope and find out whether or not it was a cancer. I gave him a slip to Dr. Hunter, and I ordered a biopsy immediately and a complete blood count.

Q. What conditions or elements led you to believe that the cancer may be present? A. Well, in the first place the man's age, he is over 60 years old, that is, about from 60—from 45 to 65, I would say, is the usual age of cancer; in the second place, his general appearance. He had a sallow complexion, well, ashen, pale complexion of the face. Then, of course, the tongue itself, the lesion, there was a sore which from the history he gave me, had lasted for almost a year, or approximately a year, apparently was not amenable to treatment—in other words, it was not getting better by ordinary treatment. It felt hard and indurated to the touch. He had glands in his neck. The thing was ulcerated and the only thing I can say is that any  
154 doctor that looks at any lesion on the tongue, he must suspect cancer if the doctor knows cancer, he will suspect it and if he suspects it, he will diagnose it.

\* \* \* \* \*

Q. What evidence, if any, was there of friction or irritation of the cancerous area of Mr. Sternal's tongue? A. Well, he was wearing the dentures, he was wearing a dental plate and he had to take it out before I could examine him.

Whether there was friction or not I can only depend upon his own statement. He told me that it didn't fit.

\* \* \* \* \*

155      The Witness: Cancer is a wild body of cells, wild tissue which grows not in accordance with the law which governs the growth of tissues. In other words, it grows against all laws which have to do with the growth of tissues. It is a mass of cells which acts as a parasite on the human body, feeds upon the blood vessels of the host tissue, upon the blood vessels of healthy tissue.

By doing that, it usurps the blood supply of the healthy tissue. It spreads by continuity. It spreads by taking up the place of tissue which is healthy and kills the host by either taking the blood supply of healthy tissue, or by spreading to distant parts of the body by means of the lymphatics and blood supply.

\* \* \* \* \*

Q. Have you found that cancer is caused by a germ? A. No, sir

156      Q. Is cancer contagious? A. No, sir.

Q. Well, has it been your experience that cancer is curable? A. Curable? Yes. Some kinds of cancer are.

Q. What kinds, for instance, are curable? A. Cancers which are easily accessible.

Mr. Cummins: What?

The Witness: Easily accessible. Cancers that we can get at are easily cured. Those which are not accessible are harder to cure.

\* \* \* \* \*

The Witness: Now, speaking generally, we all know—we don't know the cause of all cancers, but we do  
157 know the causes of some of the cancers. I will explain to you what I mean.

We know, for instance, that irritation is a causation of cancer, and we can prove it by lots of facts. For instance,

we know that cancer of the lip, from pipe smokers, particularly clay pipes, people who smoke clay pipes that are rough, they have rough edges and cause constant and continuous irritation of the lip, and eventually a great percentage of those people develop cancer of the lip.

You know, for instance, that people who have syphilis of the tongue, with its ulcer formation, eventually, with constant and chronic irritation, eventually may give rise to cancer of the tongue.

We know that plates, dental plates which are ill-fitting will give rise to cancer in a much larger majority of patients than those who never had a dental plate.

To prove that irritation is a cause of cancer, I can say, for instance, take the fishermen in Scotland, in the olden days, who used to use a whalebone needle, and tarred thread, in order to sew up his nets. Well, they had a habit of sticking the needle in their mouth, and their lips came in touch with the thread that was tarred, and tar, we know, is a carcinogenic agent, and those people had cancer of the lips.

As an interesting item, for instance, about the natives of Kashmere, in Asia, it shows—who had a habit of  
 158 carrying a basket of hot coals under their clothes in wintertime, they developed cancer of the abdominal wall, and that is a very rare site of cancer. You will probably go through a lifetime without seeing, ever seeing a cancer of the abdominal wall, and here we have the natives of a certain part of Asia who, for some reason or other, a large percentage have cancer of the abdominal wall, and there was an investigation which disclosed the constant irritation of the outside abdominal wall, caused by the basket of hot coals they carried under their clothes.

Those are some of the factors which tend to prove that irritation, chronic irritation, is a causation of cancer.

Now, we can produce cancer, experimentally, by taking a rabbit's ear, and rubbing it with tar, some form of coal tar product will produce cancer of a rabbit's ear. The same thing applies to mice.

In other words, we know that a chronic irritation can be taken and we can produce cancer experimentally. That is all the proof I know to give you.

\* \* \* \* \*

159 Q. Assuming, Doctor, that Mr. Sternal wore false teeth that rubbed and irritated this lesion on his tongue from October through May, prior to your seeing him. In your opinion, would it have been a skillful or an unskillful practice for an ordinary practicing physician, in this vicinity, to have insisted that Mr. Sternal wear such teeth constantly during that period?

Mr. Cummins: I object to the question, if Your Honor please.

\* \* \* \* \*

160 The Court: Of course, I take the position that physicians have a general knowledge of all branches of general medicine, but dentistry is such an extremely specialized form, that I doubt if a general practitioner is able to speak of what general knowledge—what the general knowledge of a dentist may be.

Mr. Fegan: In the ordinary case that would be true; but here our contention is that the man held himself out, not as an ordinary dentist, but as a dentist who possessed the skill of a doctor,—just think of that statement, “There is nothing a physician can do for you that I cannot do.”

The Court: Well, Mr. Ward, will you go back and read that question?

(Record read by the reporter.)

Mr. Cummins: He has asked what a physician would do, a general dental practitioner differs entirely.

The Court: I will permit the question.

161 Mr. Cummins: You will permit it?

The Court: Yes, but when I charge the jury, I will tell them that this is based on that statement of the defendant. If he did not make that statement, they will disregard this testimony.

\* \* \* \* \*



162 The Court: I take it you renew your objection?

Mr. Cummins: Please, Your Honor.

The Court: And I overrule the objection.

(Record read by the reporter.)

The Witness: Assuming that—I would say it was unskillful.

By Mr. Fegan:

Q. And why? A. If that is what you want to know.

Q. Why, in your opinion, would such advice be unskillful?

A. Well, you are assuming that a dental plate acted as a constant irritant, and there the idea would be to remove the source of irritation.

Q. Has it been your experience that cancer of the tongue—has it been your experience that the tongue is a common or an uncommon site of cancer? A. I would say it is fairly common.

Q. Was Mr. Sternal's cancer in its early or in the advanced stages, when you first saw him? A. It was advanced, clinically, advanced; from a pathological standpoint, it was far advanced.

\* \* \* \* \*

164 Q. When you first saw Mr. Sternal's condition, what was your opinion, based upon your experience, and other facts that you observed, with respect to whether or not Mr. Sternal had been given the care and attention of a physician, ordinarily employed by a physician of ordinary skill and ability in the District of Columbia? A. No, sir, he was not given the care and attention of a physician in the District of Columbia.

Q. And why do you say that he had not been given such care and skill? A. Because I think any physician in the District of Columbia would have detected that thing much earlier and would have taken steps to institute treatment much earlier.

Q. Doctor, are you familiar with Metaphin? A. Yes, sir, it is an antiseptic, skin antiseptic.

Q. In your opinion, would Metaphin cure cancer? A. No, sir.

\* \* \* \* \*

165 Q. What advantages, if any, would you say from your experience there would have been in detecting and treating Mr. Sternal's condition when his cancer was first discernible?

Mr. Cummins: I object to that question because the witness has already testified he does not know when the cancer would be first noticed.

Mr. Fegan: The witness already—

The Court: I overrule the objection. Answer the question.

The Witness: Repeat the question, please.

(Record read by the reporter.)

The Witness: Well, the advantage is obvious. In treating of cancer, the idea is to catch and detect it as early as possible so that treatment may be instituted as soon as possible. The advantage of it being first of all that deep X-ray therapy may have been sufficient. I am not saying it would have been sufficient, but it might have been sufficient. There would have been less disability, so far as the patient is concerned. He might have obtained a complete cure, certainly prolonged his life.

\* \* \* \* \*

171 Q. You mentioned a swelling in the neck when you examined Mr. Sternal. A. Yes.

Q. Did that have any connection with his later operation? A. Yes, sir. It is the same thing.

Q. It is? A. When I examined Mr. Sternal, he had enlarged glands in his neck, indicating that a cancer is beginning to spread to the glands in his neck and they were using deep—I mean, they were implanting radium in him before, in hopes that that probably would clear it up.

\* \* \* \* \*

172 Q. What would Mr. Sternal's prospects for complete recovery have been had his cancerous condition

been properly detected and diagnosed in its earlier stages or when first discernible? A. They would have been much better.

Q. Doctor, I shall recite to you a hypothetical case  
173 and after I recite that hypothetical case I am going to ask you some questions on it, so I will go very slowly.

A man 68 years of age was in good health, except that several years previously he suffered from coronary thrombosis. A rough edge appeared on his false teeth and scratched his tongue. Approximately six weeks later he had impressions taken for a new set of teeth. The scratch was then small, about the size of a match head, hardly noticeable, and lightly red around the edges.

A new set of teeth was made, with teeth adjacent to the cut, which rubbed against the cut for a period of nine months. By the fourth month the cut was about the size of the eraser on a pencil. By the sixth month, the cut was inflamed, sensitive and about the size of your little finger. A lump was appearing around the lesion.

By the tenth month, there was considerable pain and a large lump. The irritated area was about the size of the ordinary postage stamp, or rather, the thumb, tip of your thumb, and was developing a strange coloration.

The patient suffered severe headaches and fever. In the eleventh month, the patient was in the same condition as Mr. Sternal when you first saw him. From the second through the eleventh month the patient was advised to and did apply Metaphin over the area of his tongue, three times a day. No other treatment was given.

174 I would like to ask you some questions on this hypothetical case.

The patient was advised that a physician could do no more for him than was being done by the treatment that I have described. What is your opinion with respect to the accuracy of that advice?

Mr. Cummins: I object to that, if Your Honor please.

The Court: Overruled.

Mr. Cummins: Exception.

The Court: Answer, witness.

The Witness: The opinion is that the advice was inaccurate, it was wrong.

By Mr. Fegan:

Q. Why do you consider it wrong, Doctor? A. Because the doctor would not have treated a man with Metaphin all that time. He would not have done the thing you said.

Q. In what respect would he have treated it differently, Doctor? A. First of all, he would have made a diagnosis much earlier, substantiated the diagnosis earlier by laboratory findings. He would have sent the patient for treatment much earlier.

Q. On the basis of these facts, approximately how much earlier? A. You are saying that the initial lesion  
175 appeared approximately nine months, according to the hypothetical question?

Q. That is correct. A. The doctor would have detected it nine months ago, as soon as he saw the first little nick on the tongue. He would have begun to suspect it.

Q. Now, leaving the hypothetical question

\* \* \* \* \*

180 Cross-Examination

By Mr. Cummins:

\* \* \* \* \*

182 Q. At that point I will ask you again, I do not mean to be repetitious at this point, but at that point you were not sure that there was a positive cancer, isn't that true? A. Yes, sir.

Q. So then you sent this gentleman to a specialist, a pathologist? A. Yes, sir.

Q. So as to determine whether your guess was correct or incorrect? Isn't that the truth? A. Yes, sir.

Q. And after he went to Dr. Hunter, Dr. Hunter took a biopsy of his tongue? A. Yes, sir.

Q. And when you received the report from Dr. Hunter, is it not true that that was the first time that you were sure that he was suffering from a cancerous condition? A. Yes, sir.

Q. Now, is it the general practice of physicians, 183 and especially physicians who specialize in cancerous conditions, to take a biopsy in order to be sure that a condition exists? A. Yes, sir.

\* \* \* \* \*

Q. How many cancer conditions have you actually treated during your practice? A. I never treat cancer.

Q. You never have treated any cancerous condition? A. No, sir.

\* \* \* \* \*

184 Q. And you cannot reasonably say that those dentures irritated his tongue, or any condition of his tongue, can you? A. No, sir, I couldn't, except from what the patient told me.

Q. We don't want to hear that at this time, Doctor.

How many plates have you ever examined, how many dentures have you ever examined, Doctor? A. I don't examine dentures. I just look at them.

Q. You couldn't tell then, whether they were ill-fitted or not? A. I could not, no, sir; not by looking at 185 them.

\* \* \* \* \*

187 Q. Now, assuming that that area there had been sore for one year from June the 25th of 1945, that is one year previous, what is your professional opinion as to when the cancerous condition first developed in the patient's mouth? A. At least a year.

Q. At least a year? A. Yes, sir.

\* \* \* \* \*

189 "Question. Doctor, I will ask you a hypothetical question:

"Assuming that your patient, Mr. Sternal, had pain in the immediate area of the tongue, that was cancerous when

you first saw it; assuming that this pain was first noticed by the patient on July 15, 1944; and further assuming that in one month it was large as a pinhead; and on the 16th of September, the second month, it was large as the sulphur on the end of a house match; further assuming you found that condition on his first visit to you, what is your opinion as to when the cancerous condition first developed?"

The Witness: Probably prior to July, 1944, when I first saw him.

\* \* \* \* \*

190 Q. Now, getting back to when you first examined him, Doctor, you say you suspected that he had a cancerous condition of the neck, that is true? A. Yes.

Q. On account of the enlargement of the glands? A. Yes.

\* \* \* \* \*

195 Q. Do you know what caused the cancerous condition of this patient? A. Do I know exactly what caused it?

Q. Yes. A. No, sir.

\* \* \* \* \*

196 Q. Now, did you notice any condition that had aggravated the lesion? A. I noticed a thing, not a condition—the thing was a dental plate.

Q. The dental plate.

Doctor, I hand you what has been labeled Plaintiff's Exhibit 5, and ask you if you find anything on this denture that is unusual in any respect (passing denture to witness)? A. I cannot see anything unusual. I don't know much about these things.

Mr. Fegan: If Your Honor please, I don't think that the physician is qualified to answer the question.

\* \* \* \* \*

197 Q. Well, now, Doctor, is it not very common that people with natural teeth have cancer of the tongue? A. People with natural teeth?



Q. Yes. A. People with natural teeth have cancer of the tongue.

Q. And is it not also true that many hundreds of thousands of people having dentures never have a cancer of the tongue? A. Well—the answer is yes.

\* \* \* \* \*

Q. Is it not a fact, and do you not have personal knowledge of this, that in the past several months the medical profession, or some person interested in the medical profession and the cure of cancer, have requested many millions of dollars to be donated for the sole purpose of the cause and cure of cancer? A. That is right, sir.

\* \* \* \* \*

198 Q. Now, is it that rough surface or is it the heat of the pipe that the medical profession thinks is the cause of that type of cancerous condition? A. We think the rough surface, the constant irritation from the rough surface, aided by the heat, probably.

\* \* \* \* \*

201 Q. Is it possible to completely sterilize the mouth of a person? A. No, sir.

Q. How long will Metaphin stay on a lesion of a person's tongue? A. Not long.

Q. Is it not a fact that saliva and other reasons would more or less wash it off— A. Wash it off.

Q. Diminish the strength of Methapin, within a few minutes? A. Sure.

\* \* \* \* \*

202 Q. And your answer is, then, if a cancerous condition was present and was as large as the sulphur on the end of a match stem, if applied for one week, that application of the Metaphin would not aggravate the cancerous condition? A. That is my opinion, that the application would not.

\* \* \* \* \*

203 Q. Did he complain of fever? A. He didn't have any fever, sir.

Q. Didn't have any fever? A. No, sir.

Q. You are positive of that? A. Positive he didn't have any fever when I first saw him.

\* \* \* \* \*

205 **Dr. Oscar B. Hunter,**

\* \* \* \* \*

Direct Examination

By Mr. Fegan:

\* \* \* \* \*

Q. You are a practicing physician, are you not, Doctor?

A. Yes, licensed to practice medicine in 1912; I am specialized in pathology.

\* \* \* \* \*

206 Q. Would the subject of cancer come within that?

A. Yes, the subject of cancer comes in the study of tissue pathology.

\* \* \* \* \*

207 A. As a pathologist, I don't do very much treating. My province mainly is to diagnose and recommend types of treatment. It runs into the thousands. We have done in the neighborhood of something over 15,000 post-mortem examinations, and we have done over 75,000 examinations of the tissue of a cancerous nature.

\* \* \* \* \*

208 Q. What was your initial diagnosis of Mr. Sternal's condition? A. The initial diagnosis was that he had an ulcer of an undetermined character, and we proceeded then to find out the exact nature of it.

Q. And what was your ultimate diagnosis? A. That it was a cancer of the tongue, which we call, technically, epithelioma, a squamous cell carcinoma, fairly high degree of malignancy, grade 3.

\* \* \* \* \*

209      The Witness: Well, cancer is a disease of unknown etiology, unknown cause. It is very widespread throughout the human race and is also very common in animals. It manifests itself in many different ways, but usually follows some irritation, long-standing infection, or frequently follows a burn or sometimes develops without any previous known cause whatsoever.

\*   \*   \*   \*   \*   \*   \*   \*   \*

Q. Upon what symptoms of cancer did you base your diagnosis of Mr. Sternal's condition? A. The ulceration of the tongue, the hard brawniness of the tissue surrounding it, and the apparent beginning infiltration into the surrounding tissues by the same degree of hardness. We cannot ordinarily make a diagnosis by just looking at it,  
210      however. It requires the removal of a piece of the tissue and looking at it under the microscope; then you can definitely tell.

Many ulcers, or many lesions look like cancer and prove to be something else; but the microscope will very definitely, to the trained eye, tell you whether or not it is a cancer.

\*   \*   \*   \*   \*   \*   \*   \*   \*

212      Q. Doctor, was this an advanced or an early case of cancer? A. I consider this a fairly early case, in fact, the fact that the growth was of a relatively high degree of malignancy, and it had advanced like many of these actively growing ones did, somewhat further than the usual less malignant ones would,—one could not tell unless one knew more of the details of the history whether this developed as a primary cancer, per se, that is, developed out of a clear sky on the tongue, or whether it was secondarily engrafted upon some preceding ulcer, as the report implies there was a good bit of inflammatory reaction accompanying it,—so without knowing any of the antecedent history, one would be inclined to believe that it was probably started as an ulcer, and secondarily developed the cancerous characteristic.

Q. What was that inflammatory condition of which you saw evidence? A. That was an inflammatory condition, which is the reaction of the normal, more or less normal tissue that was being invaded by the cancerous growth.

Q. Did you see any evidence on the sore, itself, or on the tongue, of irritation caused by an external factor?

213 A. No, I couldn't say that there was the irritation that was produced there, that appeared to be part and parcel of the whole picture, but I got the impression that the ulceration had been existing for some time, possibly, prior to the development of the cancerous invasion.

Q. Well, Doctor, could this condition have become apparent as a cancer, overnight, like measles, or was it a more gradual process of growth? A. Oh, no. Cancer does not grow that way. Cancer grows, even the most rapidly, the most rapidly growing and most malignant ones, take time to develop.

Q. And by time, how much? A. I would say three months or more.

Q. Then in your opinion, approximately how long was Mr. Sternal's condition discernible or apparent? A. Well, at the time I saw it, I couldn't say how long it had been discernible beforehand, without I knew the complete antecedent history, but the tissues at the time, and the indications were that there had been a previous, some previous ulceration, or some previous induration and that cancer had developed in it and that it had been existing there for some little while, say a number of weeks or a number of months.

Q. What advantages, if any, would there have been in detecting and treating Mr. Sternal's condition, had  
214 it been detected in its earlier stages? A. Well, that goes into the realm of speculation, Your Honor. Don't you think so?

The Court: Well, if you can answer it, you can answer it.

The Witness: I don't know. I thought I was coming down here to testify according to facts, but I am supposed to testify as an expert witness,—I will proceed, then.

The Court: If you do not think you are in a position to testify as to that, well—testify—

The Witness (interposing): The only thing I can say of course is, the earlier cancer is discovered and the more radical the treatment that is instituted, the greater are possibilities the individual has of effecting a possible cure.

I say “a possible cure” because we are not at all sure that we have completely found the cure of cancer, we base our cures on years of longevity, five years, ten years, fifteen years, or twenty years.

By Mr. Fegan:

Q. What effect if any would the daily application of Metaphin to Mr. Sternal’s tongue, three times daily, over a period of nine months, have had on the course of the development of the lesion which you saw? A. The daily applications of—

Q. Metaphin. A. Metaphin? Was it full strength  
215 or diluted, or what? Ordinarily, though—

Q. Would you give me it, and in both manners?

Mr. Cummins: I think the doctor started to answer, and was interrupted. He said ordinarily—

The Witness (continuing): Ordinarily, Metaphin, even in full strength, can be applied to tissues and ulcers without any deleterious effect. If it is applied continuously, it may produce some irritation.

\* \* \* \* \*

Q. Would, in your opinion, an ordinary physician practicing in the District of Columbia be skillful or unskillful in the treatment of a cancer of the tongue if he prescribed only the daily application of Metaphin to the cancerous  
216 area, probed occasionally, and did nothing more for a period of nine months? A. That is a question, whether the individual knew he had a cancer.

Q. What would be your answer if all of the elements of the diagnosis of cancer were present, staring the individual in the face? A. Then, it would be my opinion that the patient should have had radical treatment.

Q. What do you mean by "radical treatment", doctor?  
 A. By "radical treatment" we mean surgical treatment and X-ray or radium.

Q. Those are the accepted methods of treatment of cancer? A. Yes, sir.

\* \* \* \* \*

217 Q. Doctor, is cancer cureable? A. That is a question that is still confronting the medical profession. In some instances we believe we are able to cure cancer, but our records indicate that only a relatively small percentage of the cases are completely cured, and as I have previously stated, therefore the cures at the present time are indicated in the number of years that the individual lives after the condition is discovered. An individual may live, for example, five, ten, fifteen or twenty years and may, many times die of something else rather than cancer itself, yet on an autopsy we still find there is evidence of cancer.

\* \* \* \* \*

220 Cross-Examination of Dr. Oscar B. Hunter.

By Mr. Cummins:

Q. Dr. Hunter, is it a fact that there is no definite known cause for cancer? We don't know what causes cancer? A. No. There are many theories, but we don't know the exact cause.

Q. And is there any definite cure for cancer? I mean, definite cure without a question of a doubt. A. No.

\* \* \* \* \*

222 The Witness: As I previously testified, it would be a little difficult to tell exactly when this cancer developed, because of the fact that when I saw it, and examined it, there was an ulceration, and a considerable amount of enduration, and it would be necessary to have  
 223 some considerable of the antecedent facts in connection with it.

What you tell me tends to prove, to my own mind, what I suspected, that this lesion possibly began as some sort of



an ulcer or some endurated or affected area beforehand, and subsequently became cancerous because in the examination of the tissue, we suspected that it was there, had been there for some time, but I would estimate between three and six months, because it was a relatively rapid growing cancer and if it had been present from the very beginning the probability was that it would have been very extensively endurated into his neck at the time I saw him.

By Mr. Cummins:

Q. And the cancerous conditions was in his neck at the time you saw him ? A. Yes, sir, there was some suggestion of it, that it was there, but we don't know whether that was true or not. We did feel some slightly enlarged lymph nodes there.

Q. Now, Doctor, did you find any condition in this  
224 patient's mouth which indicated something had been used on his mouth which aggravated the cancerous condition? A. No, we could not. In examining this lesion there was nothing there to indicate the condition was unduly irritated other than the irritation that frequently follows, and the inflammation that frequently follows any superficial invasion of cells from the mouth.

Q. Is it your opinion that you do not know what caused the cancer that Mr. Sternal was suffering from? A. I don't know the cause of it, no, sir.

Mr. Cummins: I believe that is all, Doctor.

225 **Deposition of Doctor Daniel Catlin**

227 **Direct Examination**

By Mr. Fegan:

228 Q. Do you specialize in any particular field of the medical profession ? A. Yes, in the treatment of cancer and in allied diseases.

Q. How long have you pursued this specialty? A. Six years.

Q. In the course of your career, approximately how many cases of cancer have you treated or diagnosed? A. I have to ask a question on that. During the time I have been in practice or during the time that I specialized in the treatment of cancer?

Q. During your entire life. A. I would say between 10,000 and 15,000 cases of cancer.

\* \* \* \* \*

## 239 Cross-Examination

By Mr. Cummins:

Q. Doctor, you testified that you first met Mr. Sternal on July 16, 1945. What is your opinion in regard to the first outward manifestation of this particular area; in other words, the area that indicated a cancerous condition? A. I do not understand the question.

Q. Taking into consideration the present condition on that date, about when was this cancerous condition  
240 first noticeable? A. I do not know.

Q. Could it have been ten years previous to that date? A. I do not know.

Q. Could it have been possible to have been ten years? A. I do not know.

Q. Had Mr. Sternal said one year and one month prior to the date that he saw you for the first time that he punctured his tongue with a sharp, protruding object on his denture, could that have caused a cancerous condition? A. I do not know. It is a highly debatable point, you see.

Q. What is your opinion as to what did cause this cancerous condition? A. I do not know.

Q. Could you, as a medical man, state about when the first discoloration appeared on his tongue? A. No.

Q. Then, Doctor, from your examination, it is not possible to tell us what was the approximate condition of Mr.

Sternal's tongue one year period to the first time he saw you?

Mr. Fegan: I object to the form of that question.

Mr. Cummins: I want it on the record.

The Witness: You want me to answer it?

241 By Mr. Cummins:

Q. Yes, you may answer it

Mr. Fegan: He is your witness.

The Witness: Yes; that statement is correct.

\* \* \* \* \*

**Dr. Daniel F. Lynch.**

\* \* \* \* \*

255 Direct Examination

By Mr. Cummins:

Q. Dr. Lynch, what is your full name, please? A. Daniel F. Lynch.

Q. And what is your occupation, Doctor? A. Oral Surgeon.

\* \* \* \* \*

A. Oral Surgery is that branch of surgery of the mouth dealing with the teeth, jaws, and adjacent structures, according to the law of the District of Columbia.

\* \* \* \* \*

256 Q. Now, Doctor, I desire to ask you a hypothetical question:

Assume a man, aged 69 years, sought dental services from a dentist in this jurisdiction, and after a conference, requested the dentist to make him a full upper denture and a lower partial denture; and further assume, meaning that on the first visit the patient made to the dentist, that there was a small sore on the tongue which appeared to the naked eye as being no larger than the sulphur on the head of a household match; and further supposing that at that time he gave the past history to the dentist that before

that they can take impressions or put the dentures in and the people can go right out and eat steak, right off the bat, and have no trouble at all.

Q. Doctor,—excuse me. A. (Continuing) In my weak way, I think a lot depends on the temperament of the patient, the kind of patient you are dealing with. Some people will fight their dentures, and others will give them, even an ill-fitting denture, and by golly, they will work it  
262 just as well. They chew with it and they get along fine, and in my practice that puts you on the spot all the time, because you have got patients coming in and they have got dentures that they know don't fit, and you advise them that they should get new dentures, and they go and get new dentures and show up with the old ones back in their mouth, because they don't like the old ones. That is a hard question to answer directly. It depends on the patient and the dentist. I would say it that way.

Q. Doctor, is it unusual for a patient to return to the dentist's office for a period of, say six weeks, in order to get a proper fitting of a denture? A. No, no. Some of them return longer than that.

Q. Now, Doctor, how many cases, or how many patients have you had with ill-fitting dentures, during your practice? A. I think I would say that the number of dentures—a higher percentage of ill-fitting than are fitting, according to the patients.

Q. Do you know approximately how many ill-fitted dentures that you have observed? A. No, I couldn't give you any percentage on it.

May I answer it this way: I have seen a lot of dentures that, from a technical point of view, fit perfectly; but the patient would say that they can't use them, they don't fit.

Well, there are a lot of reasons for that. For instance, you might be able to put the teeth in the  
263 mouth and they will fit good, but when the patient starts to move the jaws, the muscles will raise the dentures up. Well, from the patient's point of view, they don't fit.

From the doctor's point of view, they do fit, because you take an impression, the only thing you do is, you can take the impression and make the dentures fit that impression. You have got a perfect impression, make a model and make the dentures fit that model. Now, the whole science of the whole thing becomes to make that inanimate thing function. That is where the science and the art comes in. That is why there is a difference in the price of a denture. It isn't the material. That denture, once it is put on the ridge, it has got to function, and that requires a good deal of study. The man who has looked in the mouth, sees the muscles move, knows which muscle is disturbing the denture, and he counteracts that so that some cases that have good ridges will wear a denture right off the bat, and then other cases, for instance people who hold onto their teeth too long and they have pyorrhea, let's say, and either pyorrhetic resorption has caused the ridge to recede, in other words, they haven't any ridge on which to work,—naturally you will have more complications and functions there than you will with a patient who is young and who has a good bone to work on. That is a hard question to answer.

\* \* \* \* \*

264 The Witness: I am not qualified to answer that question because I don't make dentures, but in my field, as a diagnostician of the mouth, I see these dentures come in, and it is generally the usual procedure to grind a denture, that is, cut it down where it is irritating and then smooth it down.

\* \* \* \* \*

265 Q. What is your opinion with respect to the patients that have come into your office with ill-fitted dentures, as to the approximate number that have had cancer?

A. Oh, well, the percentage that have cancer is very small. I mean, it is a small percentage that have cancer.

Q. Would you say one per cent? A. No, it wouldn't be that much.

\* \* \* \* \*

266 Q. Now, would Metaphen on a lesion of the tongue, say for a period—applied three times a day for one week, if you can answer that question, three times a day for one week, would that aggravate a cancer or cancerous condition? A. I don't think so.

267 Q. Doctor, what is that makes Metaphen disappear in the mouth after it has been applied? A. The fluids in the mouth.

#### Cross-Examination

By Mr. Fegan:

268 The Witness: On the other hand, a chronic irritation over a long, prolonged period of time, would produce what we call hypertrophied tissue. That is overproduction of cells to that area. Not necessarily is it cancerous, because we see a tremendous amount of that kind of thing in the mouth, especially from ill-fitting dentures, hypertrophic tissues, and fibrous type of tissue, somewhat like scar tissue, when you cut your hand and the tissue heals, you will have a little white line appear. That is scar tissue.

Q. You say that it would not necessarily be cancerous? A. That is right.

Q. You mean it could be cancerous? A. It has been proven that prolonged chronic irritation of a denture or anything else in the mouth can produce cancer, but it is over a long period of time.

#### 277 Re-Direct Examination

By Mr. Cummins:

The Witness: Well, the more experience you have, the more cocky you are at making a clinical diagnosis, but gen-



erally when you don't know, you wait, maybe, oh, I have waited as long as six months on some because I just wanted to watch them and see if the progress,—if it remained the same, and there is no change, you better just leave it alone, and watch, no matter what it is.

Q. Watching a lesion for six weeks before you recommend a patient to see a physician, would that be unreasonable? A. No, that would not be unreasonable.

Q. Now, on direct examination I believe that you said that you did not think the usual dentist or the usual physician was capable of actually diagnosing cancer. A. Not unless it is a class book picture, even—I mean in the incipency, I don't think that the average physician is capable of diagnosing it clinically, and I don't believe the expert, without doing a biopsy. In fact, I think they are not.

Q. Is that the only way definitely to determine a  
278 cancerous condition? A. In biopsy they cut a piece out, put it under the microscope and you see the changes. That is the only sure way of making a diagnosis.

Q. Is there any actual definite known cause for causing cancer? A. No, there is no known, to my knowledge, there is no known cause for cancer. There are a lot of theories, a lot of hypotheses. One is the irritation theory.

\* \* \* \* \*

The Witness: I mean cancer of the mouth—There is another fact that smoking, for instance, will produce an irritation in the mouth. You don't see as much cancer of the lip any more since they don't smoke clay pipes. The old Irishman that used to smoke them,—You used to see a lot of epithelioma of the lips, and there is not as much of that as there used to be. There was the tartar that formed on the back of the teeth and became an irritation and, in other words, the dirtier the mouth, the more chance there is,

\* \* \* \* \*

280 Q. Doctor, may I ask you one hypothetical question:

Assuming that this patient that we have discussed had a lesion on his tongue on September 20, 1944, as large as the sulphur on the end of a house match; assume that on the month preceding September, August 16, it was as large as a pin head; further assume that on July 15, the month preceding, it was merely discolored and showed the first sign of pain and that this cancer, the following year, was as large as the end of the thumb: In your opinion, when did cancer develop in that patient's mouth? A. I couldn't answer that, I don't know.

\* \* \* \* \*

285      **Dr. Abraham P. Kasmer, the defendant,**

\* \* \* \* \*

Direct Examination

By Mr. Cummins:

\* \* \* \* \*

288      Q. Do you recall having any conversation on that date with respect to a lesion of the tongue? A. The only thing that I can recall is that Mr. Sternal told me that his lower plate, the clasp on his lower plate having engaged his tongue, punctured the tongue. The case was very loose in the mouth and he couldn't wear it, and for that reason he came up to have a new set made.

\* \* \* \* \*

289      Q. What did you do, in your professional manner, on September 20th? A. I took my preliminary impressions of his upper and lower jaws.

\* \* \* \* \*

Q. And what professional services did you render on the 25th? A. I continued with the construction of his upper and lower cases by taking what we call a "bite," that is, to get the relationship between the upper and lower jaws so that we would be able to place the teeth in their proper position and so that we would have an occlusion between the upper and lower teeth.

Q. Up to that date, had you recommended any  
290 Metaphen for the lesion of the tongue that he spoke  
of on the 20th? A. I don't believe so. It is very hard  
to recall, but I do not believe so.

Q. When was the next appointment he had with you?  
A. The next was on the 2nd of October.

Q. And what services did you render on that date? A. On  
that date I had the teeth ready set up, and tried them in the  
mouth, a process known as "try-in." I tried the upper  
plate and the lower partial denture into the mouth to see  
how they fit. If at that time we were satisfied they would  
fit, I would continue and complete the case.

Q. On what date did you complete the case? A. On the  
9th of October.

Q. On that date, did you insert the upper and lower den-  
tures in his mouth? A. Yes, sir.

\* \* \* \* \*

Q. You heard his testimony yesterday,—that you agreed  
to treat and cure that lesion of the tongue. Was that true?  
A. That is not true.

Q. Did you have any understanding with him in  
291 regard to treating the tongue? A. No, sir.

\* \* \* \* \*

Q. Now did you recommend anything to him on either  
of those dates? A. I think I did tell him that I would put,  
—use an antiseptic known as Metaphen, but that it would  
be advisable for him to see a physician, if the tongue per-  
sisted in bothering him.

\* \* \* \* \*

292 Q. Now, you have heard him testify that he con-  
sulted you and asked you whether you thought it  
best to get a physician to look at the tongue. Do you recall  
any conversation in that regard? A. That is not true. As  
a matter of fact, just the reverse,—I suggested to him that  
he see a physician.

Q. And about when did this conversation occur? A. Well, it was sometime in early October.

Q. Early October? A. Or the 25th of September, I can't recall exactly which day it was.

Q. What was the conference or discussion between you and Mr. Sternal in regard to a physician? A. Mr. Sternal told me he had been in town for a very short time and didn't know any physician. At that particular time it was rather difficult for a new patient to get a physician because of the number of physicians who had been taken into the service, and new patients had quite a bit of difficulty in getting a physician.

I told Mr. Sternal that I would get in touch with my own personal physician and see as to whether or not he would be able to take care of him.

293 Q. Now, as a result of that conference with Mr. Sternal did you contact any physician? A. I did.

\* \* \* \* \*

295 Q. The 29th of November did you and he have any discussion in regard to his tongue condition? A. Well, I asked him how he felt. It still looked a little red-ish, but he told me he had no pain there whatsoever. I asked him also whether he had seen Dr. Levitt, and he said his condition didn't warrant seeing him, he didn't feel pain and didn't think it necessary to see him.

Q. Each time he called at your office for professional treatment, did you tell him to use Metaphen? A. No, sir.

Q. On how many occasions up to November 29, 1944, had you told him to use Metaphen? A. I told him to use Metaphen until he sees his physician, and was under the impression that he would probably see the physician within a very short period of time.

Q. Did you say anything to him which would indicate to a reasonable person that he should use Metaphen every day, three times a day, for an indefinite period of time? A. No, sir.

Q. Did you see Mr. Sternal any more that year? A. From—

296 Q. From November 29th, on. A. No, sir.

Q. When was the next time you saw Mr. Sternal?

A. March 3rd, 1945.

\* \* \* \* \*

Q. Now did you see him any other date during the  
297 month of March, other than the Third? A. No, sir.

Q. Did you see him any day during the month of  
April? A. No, sir.

Q. Did you see him any day during the month of May?  
A. No, sir.

Q. What was the next appointment he had with you,  
Doctor? A. On the 14th of June.

Q. Does your card indicate that? A. It doesn't indicate  
the 14th of June because I didn't do anything for him that  
day except take a picture of a tooth he complained was  
bothering him.

Q. What is the next day after the 14th? A. The 16th of  
June.

Q. What dental services did you render then? A. Ex-  
tracted his lower right second molar.

\* \* \* \* \*

300 Q. He said, on direct examination,—Mr. Sternal  
said you had filed the side of a denture. Can you ex-  
plain that? A. Well, he may be referring to the ad-  
301 justment that I made between October the 9th, the  
day that I inserted the cases in his mouth, until his  
last visit of that year on November 29th.

Those several times during that particular period he pre-  
sented himself so that I would adjust the edges of the case  
to fit snugly against the tissues.

\* \* \* \* \*

304 Cross Examination

By Mr. Fegan:

\* \* \* \* \*

307 Q. Doctor you testified, I believe, that you asked—  
that you advised Mr. Sternal to see a doctor about

308 his tongue,—is that correct? A. Several times.

Q. Why did you give this advice. A. Because the area on his tongue did not seem to improve.

\* \* \* \* \*

314 Q. Will you describe the appearance of the tongue when Mr. Sternal first came to your office? A. He had, it seems to me, if I can recall, it is quite a while back, but if I can recall,—he just had a sort of reddish area on the side of his tongue, extending over the top of the tongue.

Q. Now, will you describe the appearance of the tongue on June 19th, the last time that you say you saw Mr. Sternal? A. Well, at that time the area was probably about the same size, but it was much redder and it seemed like part of the tissue had been removed, or eroded.

\* \* \* \* \*

321 The Witness: Now, when he came in March 3rd, I saw no difference in the condition of his tongue. On the 16th of June, however, I noticed that the irritation was in worse condition, and consequently decided, at that time, to remove the teeth on the left side of the mouth as a temporary relief, and to make sure that there would be no irritation; but I did advise the patient, definitely, to see a physician at that time; but the removing of the teeth on the left side was primarily to relieve the irritation that the teeth may be causing, but I saw definitely that at that time it was worse than when I had seen him three or three and a half months previously, and certainly much worse than it was when I dismissed the patient on the 19th of November. So, I advised the patient at that time, that it would be best to remove the teeth on the left side so that it would remove a possible source of irritation if that was causing irritation. I wouldn't say definitely if it was or wasn't. I felt that I was not qualified to judge that, so I felt it would be best, as a temporary expedient to remove the teeth on that side, and see to it that the patient,—and advise the patient to go to a physician.

\* \* \* \* \*



## 323 Redirect Examination

By Mr. Cummins:

\* \* \* \* \*

324 "Q. How long a period did Mr. Sternal see you following that? "A. His first visit was September 20th, 1944, and his last was approximately around the 19th of June. He may have been in several times after that for adjustments. I don't recall.

\* \* \* \* \*

326 The Court: Have you gentlemen prepared any instructions on this case?

Mr. Fegan: Yes, Your Honor.

Mr. Cummins: I haven't completed mine, I have a few.

The Court: You might let me have them, so that I might consider them overnight.

I don't take it there is much question as to the law in the case—I don't understand there is much question as to the law.

\* \* \* \* \*

The Court: I shall give my usual charge on what is meant by the burden of proof, the credibility of witnesses, and so forth and so on.

Mr. Fegan: Would Your Honor charge—

The Court: I will not consider a great number of instructions. If you have too many, I won't consider  
327 any of them.

Mr. Fegan: I have eleven.

Mr. Cummins: Does Your Honor want them now? Would a carbon copy be all right?

The Court: I don't expect to take a great long time reading a large number of instructions.

Mr. Cummins: I might as well—

The Court: I don't mean I know the law, but I think the law is pretty well settled in a case like this.

I may think I know the law and the next decision of the Court of Appeals convinces me that I know nothing about it.

\* \* \* \* \*

329 The Court: Mr. Cummins, you will have to go over these instructions. There is so much repetition in them.

Mr. Cummins: Yes, Your Honor.

The Court: They are a different way of saying the same thing.

Mr. Cummins: Yes, sir. May I make one comment, Your Honor? In urging my motion yesterday, I failed to call Your Honor's attention, as a basis for my motion, to the testimony of Dr. Catlin, of New York, as a witness for the plaintiff. He said he didn't know what caused the cancer. It could have been caused ten years ago, he didn't know what caused cancer at all. It might be repetition, but the doctors, the witnesses for the plaintiff, the testimony unquestionably indicates, as I went over it, that to bring in the defendant—that the defendant caused the cancer, would mount to a conjecture, and suggesting a guessing contest, and I urge that again today, that that portion of the plaintiff's complaint—

The Court: I think there is enough to go to the jury, although this might be argued on a motion for a new  
330 trial, if there is any substantial evidence to go to the jury on an issue, I think it is my duty to submit that to the jury.

Mr. Cummins: I haven't found any substantial evidence at all in the record—as to causing the cancer.

The Court: Certainly one physician did state that friction might.

Mr. Cummins: I didn't hear you, sir?

The Court: One physician did say, when he spoke of the experiment on rabbits, that friction might cause it.

Mr. Cummins: Cancer from the form of dentures—

Mr. Fegan: Remember that Dr. Hunter said that cancer could not have present—

The Court: What?

Mr. Fegan: Dr. Hunter said that cancer could not have been present when this man came to the dentist.

Mr. Cummins: I didn't hear him say that.

The Court: I will submit it to the jury and you may take your exception.

Mr. Cummins: Exception.

\* \* \* \* \*

332 The Court: Now, frankly on the question of whether there is enough to go to the jury on the question of whether the defendant's negligence caused cancer, I think the evidence is quite weak on that.

Of course the other question, whether it was his duty to diagnose a cancer, as a physician or as a dentist, either, and whether his treatment was negligent so that that cancerous condition continued or was increased, of course there is ample evidence to go to the jury on that question, but on the question of whether his negligence caused cancer, then I think the evidence is very weak on that question, and I am inclined to tell the jury that in my opinion it is; but, I will leave that to the jury because there is some evidence on that question.

\* \* \* \* \*

334 Mr. Cummins: 7, there is no testimony that anything caused the cancer.

The Court: I disagree. I think there is some evidence, but I think I will tell the jury that I think the evidence is little or slight.

Mr. Cummins: The expert witnesses said they didn't know what caused the cancer. I specifically asked that question.

The Court: I don't think each one of them did, I don't remember the name, but I think Dr. Hunter did.

Mr. Cummins: I personally asked Dr. Hunter.

The Court: It may get you a new trial.

Mr. Cummins: I think it is in the record, I personally asked him "Do you know what caused cancer?"

The Court: Who was it testified about irritating the rabbit's ear?

Mr. Fegan: That was Dr. Kossow.

Mr. Cummins: It was his opinion, if the tongue  
335 was sore in July, the cancer had developed then, or prior to then.

The Court: Well, that is the question, whether or not the doctor caused it. If it developed prior to the time he went to the doctor, then the doctor of course did not cause it.

\* \* \* \* \*

337 Mr. Cummins: Now, where their own expert witnesses each one have testified that they do not know what causes cancer, Your Honor, I submit that there is nothing for the jury to consider. I, pointblank, purposely asked each expert witness did they know what caused that cancer, and they said: "no."

Mr. Fegan: If Your Honor will recall, that answer was qualified by Dr. Kossow. He said we don't know all of the causes of cancer in all of the organs, but on external, easily accessible external cancers, we do know that irritation causes cancer, because we took a rabbit and—

The Court: That is my recollection.

I will submit it to the jury, although—

Mr. Cummins: May I read his testimony, if he has it here, in regard to when this cancer did develop? Your Honor may want to have that.

The Court: I will submit the issue to the jury, and if I am wrong and there is a verdict rendered for the plaintiff, the Court of Appeals may very well correct it.

Mr. Cummins: If Your Honor is satisfied that Dr. Kossow said that, and it would affect Your Honor's judgment, I would like to get that information for Your Honor.

The Court: No. 8, substantially charged. I always give—

\* \* \* \* \*

338       The Court: Now, Mr. Cummins, if you will revise yours—

Mr. Cummins: I haven't had time to go over mine, but I have a lot of repetition here.

\*       \*       \*       \*       \*       \*       \*       \*

344       Mr. Cummins: Dr. Kossow, in 1944, when he had the first pain in Chicago, that was plaintiff's doctor, Dr. Kossow, that was his opinion, and that statement should be considered by Your Honor as expert testimony that he had the cancer condition before he went to Dr. Kasmer.

Mr. Fegan: I haven't even heard what you have been saying.

Mr. Cummins: At the bottom of page 11.

In conjunction with that, every expert has testified they did not know what caused cancer.

Mr. Fegan: Did not know what caused this cancer? I admit the witness did not say "this is what caused the cancer."

The Court: Do you contend that is any evidence tending to show that treatment or lack of treatment caused  
345       this cancer?

Mr. Fegan: Any evidence either by experts or by witnesses?

Mr. Cummins: Any evidence either by experts or by witnesses??

The Court: What else?

Mr. Fegan: I recall two witnesses that made analogy to the pipesmokers, that pipes, the irritation caused by the pipes, caused cancer.

Mr. Cummins: In his deposition, he says he smoked a pipe in 1942.

The Court: I will let it go to the jury, although I think I will tell the jury that in my opinion, the weight of the evidence is not that he in any manner caused that cancer, but I will tell them that there was evidence to that effect and I will give it to the jury on that question.

I will also tell the jury, of course, the burden of proof is on the plaintiff to prove that either he caused the cancer or that his treatment was negligent and the fact that I expressed a view as to the weight of the evidence, as to the cause, should be taken as no indication, one way or the other as to any views on the weight of the evidence on the other claims.

That is what I expect to charge the jury.

Mr. Cummins: Exception, Your Honor.

\* \* \* \* \*

348 Mr. Fegan: Yesterday, you expressed the opinion that you may remark concerning the causation.

You said yesterday, Your Honor, that you might remark to the jury respecting the causation of cancer.

In that respect, I would like about five minutes to call Your Honor's attention to the definition of the term "cause" as distinguished between the medical and the legal definition.

If you ask a doctor what causes a common cold, he will say a cold germ.

If you ask a lawyer what causes a cold, he will say, wet feet, as in cases where a railroad perhaps had helped some passenger to alight in weather—

The Court: I suggested I might say something about the evidence being very slight on that subject, but I will not say that, because as I recall the testimony, there is a good deal of the testimony to the effect that friction may cause cancer.

Mr. Cummins: But the testimony of all the experts was, they don't know what caused this cancer.

The Court: They may not know what the bottom  
349 cause was, but they did testify that friction may bring about cancer.

Mr. Cummins: In this case, there was friction in these other teeth—

The Court: It is a matter for the jury to decide whether the doctor's treatment, the type of treatment produced friction to such an extent as to cause cancer.



Mr. Cummins: Will you also instruct the jury that they can also take into consideration the sore tongue in July and the condition of the patient's teeth?

The Court: I don't expect to argue to the jury, I expect to simply tell them the evidence on it, examine the evidence on whether he caused—

Mr. Cummins: Will Your Honor not instruct them to take into consideration the patient's teeth and tongue prior to coming to Dr. Kasmer?

The Court: I will tell them he may have had cancer before he came, or cancer may have developed after he came to see the doctor; but whether it developed or not, it doesn't follow that the doctor's treatment created it, and there is a very serious issue of fact as to whether the doctor undertook to go beyond the treatment of a dentist.

\* \* \* \* \*

351 **Instructions to the Jury**

\* \* \* \* \*

353 As to whether or not the treatment by the defendant caused the cancer of the plaintiff's tongue, you will recall testimony of experts that the cause of cancer is not known.

On the other hand, there is testimony that cancer may be caused by friction.

Now, whether or not the cancer in the plaintiff's tongue had its origin before he went to Dr. Kasmer, or whether it arose afterward, or whether, if it did arise after, its cause was due to the negligent treatment of Dr. Kasmer, or if it originated before, whether it was made worse, or neglected by Dr. Kasmer, are facts for you to decide.

So, you must decide first whether this cancerous condition existed before Dr. Kasmer treated the plaintiff; second, if it did not exist before, whether it was caused by his negligent treatment or lack of proper treatment, or whether the condition was made worse by his treatment or lack of proper treatment.

\* \* \* \* \*

354 If you believe that the plaintiff, Mr. Sternal, punctured his tongue, and that the defendant was employed by him to treat, to attend and to administer, and the defendant entered upon and undertook that treatment and did attend, administer or treat the plaintiff's tongue, and assumed charge of the treatment, then the plaintiff was entitled to receive from the defendant the care, attention and skill that defendant held himself out to plaintiff to possess; and if you find that he did not receive from the defendant that degree of care, attention and skill, and in consequence of not receiving it, suffered pain, suffering or injury, or increased pain, suffering or injury, then the defendant is liable.

\* \* \* \* \*

355 If you find that two or more causes contributed to the plaintiff's cancer, and you shall find that the defendant is responsible for one or more of these causes, then he is liable to the same extent as though the cancer had been caused by his negligence alone. In other words, if you find that the cancer, if any, was caused by two or more concurrent causes, and if you should find that defendant was negligent and his negligence constituted one of the concurrent causes of the cancer, then the defendant is liable for such injuries to the same extent as if he alone had caused that cancer.

\* \* \* \* \*

356 The burden of proof is upon the plaintiff to show, by the greater weight of the evidence, the liability of the defendant under the conditions as to which I have instructed you.

The burden of proof is not a question as to whether there are more witnesses on one side or another as to a particular point. It is whether or not the testimony of all witnesses has a greater weight, in your mind, than the testimony of opposing witnesses.

\* \* \* \* \*

358        On the other hand, if the evidence is equally bal-  
              anced and you find plaintiff has not sustained the  
359        burden of proof and you find that the defendant was  
              not negligent in his treatment of the plaintiff, then  
your verdict should be for the defendant.

\*        \*        \*        \*        \*        \*        \*        \*

Mr. Cummins: And in conclusion I want to make an ex-  
ception to Your Honor's instructions, in fact to every in-  
struction in regard to the defendant causing the cancer.

\*        \*        \*        \*        \*        \*        \*        \*



BRIEF AND APPENDIX FOR APPELLEE

---

IN THE

United States Court of Appeals  
for the District of Columbia

Docket No. 9593

*United States Court of Appeals  
for the District of Columbia*

A. P. KASMER,  
*Appellant,*

*v.*

PAUL STERNAL,  
*Appellee.*

FILED SEP 19 1947

*Joseph W. Stewart*

CLERK

APPEAL FROM JUDGMENT OF THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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IN THE

**United States Court of Appeals  
for the District of Columbia**

---

Docket No. 9593

---

A. P. KASMER,  
*Appellant,*

*v.*

PAUL STERNAL,  
*Appellee.*

---

**APPEAL FROM JUDGMENT OF THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA**

---

**I. STATEMENT OF THE CASE**

This is an appeal testing whether or not a motion for a directed verdict should have been granted defendant in a malpractice action. Plaintiff alleged that defendant's negligence caused and aggravated cancer of plaintiff's tongue, neck and surrounding areas. The sole issue here validly presented \* is whether the trial court erred in allowing the issue of causation to go to the jury; i. e., whether there was sufficient evidence of record to permit the jury to determine, as it

---

\* All other issues attempted to be raised by this appeal were not properly preserved before the lower court in accordance with Rules 46 and 51 of the Federal Rules of Civil Procedure. (See Sec. III A, post, pp. 7-10.)

did, that defendant caused cancer or contributed to causing it.

Upon the facts hereinafter set forth, the trial justice denied defendant's motion for a directed verdict as to causation. The jury found in favor of plaintiff. A motion for a new trial was overruled, whereupon, this appeal was entered.

## A. THE FACTS

### (a) THE DEVELOPMENT OF PLAINTIFF'S CONDITION AND ITS TREATMENT BY DEFENDANT.

In July, 1944, plaintiff noticed that a sharp prong on his false teeth had scratched his tongue (Appendix \* 10, 19). He consulted defendant, a practicing dentist, on September 15, 1944, in order to have the condition remedied and treated (App. 10-11). The cut then was small, no larger than the head of a match, and appeared to be what it was—a scratch (App. 10, 20).

Defendant examined plaintiff's tongue and dentures, and attributed the scratch on plaintiff's tongue to the prong on the dentures. He prescribed a new set of false teeth which he said he would make (App. 10-11, 77-78) and directed plaintiff to apply metaphen to his tongue three times daily (App. 10-11, 77-78). Plaintiff inquired whether or not he should seek medical advice respecting his tongue; whereupon, defendant replied: "There is nothing serious about this tongue, there is nothing that a physician could do there but what I can't possibly attend to" (App. 11, 86). Whereupon, defendant undertook to construct a set of dentures and to treat plaintiff's tongue (App. 10-11). The dentures constructed by defendant were placed in plaintiff's mouth in early October, 1944 (App. 12, 53). These dentures proved to be improperly constructed and fitted; the edges of the teeth on both the upper and lower plates rubbed and severely irritated the cut on plaintiff's tongue (App. 71-76).

Plaintiff returned to the defendant on an average of once each week, complaining that the dental plates and the

---

\* Hereinafter abbreviated to "App."



metaphen were severely irritating to his tongue (App. 72, 78). Defendant would each time examine the tongue, would sometimes apply medication to it, and would attempt to adjust the dentures (App. 71-74). At all times, defendant directed plaintiff to wear the teeth, forget the tongue and continue the application of metaphen (App. 72, 78, 81). By the latter part of November, 1944, the cut had grown to the size of the rubber on the end of a pencil (App. 15) and had a dark layer of film covering the wound (App. 16, 22).

Again in November, 1944, plaintiff asked defendant if he should see a physician about his tongue. Defendant replied, "There is nothing serious in there. We can fix that" (App. 87). On several occasions defendant told plaintiff that his experience was wide and diversified; that he had broadened his experience by going to the Mayo Clinic and observing the treatment given there; that he knew what he was doing and that plaintiff "should have full faith and confidence in his treatment" (App. 87, 90). Plaintiff was reassured and continued to believe that he was getting the same treatment that a physician would normally give (App. 86-90).

Plaintiff applied the metaphen as he was instructed, and regularly returned for treatment of his tongue and for adjustment of the plates, which continued to irritate his tongue (App. 71-72). On each visit the defendant inquired if plaintiff had used metaphen three times daily and assured plaintiff that the condition of the tongue was satisfactory; "Use your teeth," said defendant, "your mouth will get gradually accustomed to those pains." "Just forget the teeth, forget the tongue and wear the teeth" (App. 72).

By the end of January, 1945, the cut was ulcerated and had grown to the size of the tip of the little finger. It was inflamed and was getting more and more painful (App. 15). A strange coloration and a hardening mass was noticeable around the wound (App. 16, 17). These conditions were called to defendant's attention but he insisted that the plaintiff continue to wear the misfitting dentures and to apply the metaphen (App. 80-81).

By May, 1945, the cut had grown to the size of the tip of the index finger, and patient suffered severe headaches (App. 15). The wound bled readily and was sensitive to the touch (App. 15). Again, plaintiff was told not to see a physician. "Forget the tongue," said defendant, and he assured plaintiff that if he (defendant) continued his treatment and adjustments to the dentures, the tongue would promptly heal. The tongue was then cancerous (App. 69-70, 88-89).

By June, 1945, plaintiff had made more than 27 visits to defendant for the treatment of his tongue and for the adjustment and construction of his dentures (App. 13). The wound then covered an area larger than one inch square and extended almost the full depth of the tongue (App. 32). In June, 1945, defendant proposed to make a second set of dentures for plaintiff with no teeth adjacent to the cut on the tongue "so that they would not aggravate his tongue" (App. 88-89). "You keep on using the metaphen, as I have told you," he said, "and I will definitely give you a set of teeth where the friction will be eliminated" (App. 72). Defendant's tongue had then been cancerous for from three to six months (App. 69-70). Thereupon, defendant undertook to construct a second set of dentures that would not "aggravate" or "irritate" plaintiff's tongue (App. 71-75).

The second set of dentures was never completed. On June 26, 1945, plaintiff suffered a slight attack of a previous heart ailment. He consulted Dr. Maurice Kossow, a physician, who in the course of his examination noticed the condition of plaintiff's tongue and immediately diagnosed the condition as cancer in its advanced stages (App. 27).

The subsequent treatment, operations, sufferings and expenses of plaintiff and the spread of the cancer to plaintiff's neck and surrounding areas are not here of importance to the appeal.

#### (b) EXPERT TESTIMONY.

The expert testimony presented both by the plaintiff and defendant is unanimous in that the medical and dental pro-

fessions recognize that chronic friction and irritation cause cancer (App. 66-68).

All the causes of cancer are not known. It has, however, been established that chronic irritation causes cancer. Such irritation may be caused by physical or chemical irritants. One of the more common sites of cancer is the mouth, where cancer is caused especially by the irritation of misfitting dentures (App. 50, 66, 76-77).

Cancer is neither caused by a germ nor is it contagious (App. 28). It is a runaway growth of tissue cells prompted by external factors (friction and irritation) (App. 66-68). Cancer of the mouth is susceptible of ready diagnosis, and if detected and treated early, is curable (App. 26, 29, 90, 91).

For these reasons, dental students are taught rather exhaustively concerning the causes and the diagnosis of cancer of the mouth. The dental profession generally recognizes that if a sore in the oral cavity does not respond to treatment, particularly when the sore had been subjected to irritants, a physician should be consulted promptly in order that cancer may be prevented or arrested in its early stages (App. 85).

There were two irritating forces present in plaintiff's mouth: misfitting dentures and metaphen (App. 76-77, 79). There were no other known causes of cancer present (App. 76, 77).

In substance, the experts unanimously agreed that it was unskillful for a dentist to have failed to consult a physician respecting plaintiff's condition, or for either a dentist or a physician to have advised plaintiff's exposure to chronic irritants for a period of nine months (App. 80-85). The experts were agreed that defendant was negligent under the skill incumbent upon either an ordinary physician or an ordinary dentist practicing in this vicinity (App. 80-85).

Defendant asserted that he did not treat plaintiff's tongue and that he possessed neither the skill nor ability to treat plaintiff's tongue when it was in the stages of either lesion, ulcer or cancer (App. 5, 74).

The testimony of record respecting defendant's negligence

in relation to the causation of cancer is set forth at length in the Argument and Appendix hereinafter.

## II. SUMMARY OF ARGUMENT

The only issue here duly presented on appeal is whether or not the lower court properly allowed the jury to determine whether defendant caused cancer to plaintiff. All other issues attempted to be raised by appellant were not properly preserved in the court below.

If, and only if, all reasonable men must find from the evidence, and every reasonable inference therefrom, that appellant could not have caused or contributed in causing appellee's cancer, may appellant prevail in seeking to set aside the verdict of the jury. It is not the function of this court to weigh the evidence as does the jury; its function is to determine whether there was, as a matter of law, sufficient evidence of causation for the jury so to weigh the evidence.

Appellant held himself out as possessed of the skill and ability of a physician and undertook to exercise such skill and ability in treating and prescribing for appellee's tongue. He is held as a matter of law to that degree of skill and care he undertook to exercise.

The record shows that cancer, such as suffered by the appellee, is caused by chronic friction and irritation. In appellee's case, there were two irritating factors present for a period of more than nine months.

The prime irritant was a set of dentures negligently constructed and fitted by appellant; the appellant prescribed that these be worn constantly. The second irritant was metaphen, applied three times daily to appellee's tongue under appellant's direction. There was no other known cause of cancer here present.

Reasonable men can and have found that appellant's negligence caused appellee's cancer in one of three ways (or by a combination thereof):

First: Appellant negligently and without due professional care or skill, constructed and fitted a set of den-

tures, the friction and irritation from which caused cancer or contributed to causing it;

Second: Appellant negligently, and without due professional care or skill, prescribed that appellee expose himself to two chronic irritants, misfitting dentures and metaphen, for a period of nine months. As a result of such exposure, cancer was caused to appellee;

Third: Appellant negligently and without due professional care or skill advised that appellee not consult a physician and that he (appellant) was as qualified and competent to treat appellee's tongue as was a physician. Had a physician been consulted when appellee's wound was a cut or later an ulcer, appellee would either have suffered no cancer, or his cancer would have been much less severe.

Only if no reasonable man could find as did the jury, should appellant prevail.

### III. ARGUMENT

- A. ALL ISSUES EXCEPT ONE, ARE ATTEMPTED TO BE RAISED BY APPELLANT FOR THE FIRST TIME IN THESE PROCEEDINGS; JURISDICTION IS NOT IN THIS COURT TO CONSIDER THOSE ISSUES.

All issues, except as raised in Section I of Appellant's Argument (pp. 11-26) are here raised by appellant for the first time.

- (a) DEFENDANT FAILED TO OBJECT TO TESTIMONY.

It is well settled under Rule 46 of the Federal Rules of Civil Procedure 28 U.S.C.A. 723-c, that where no objection was made at trial, or where no reason or ground for an objection was stated at trial, the appellate court shall not consider the issue on appeal. *Tucker v. Loew's Theatre & Realty Corp.* (C.C.A. N.Y., 1945), 149 F.2d 677; *Stewart v. U. S.*



(C.C.A. Ala., 1942), 131 F.2d 624, cert. denied 318 U. S. 779, 87 L. ed. 1147; *Moore's Federal Practice*, Vol. 3, pp. 3089, 3090.

The following points relied upon by appellant are improperly raised at this time; no objection was voiced at trial; therefore, such points would seem to warrant no refutation or argument by appellee:

1. Section II Appellant's brief pp. 26-29, "There was not sufficient evidence of defendant's negligence to warrant submission of the case to the jury" (See: *Abbott v. Fant* (D. C. Mun. App., 1944), 38 A.2d 618);

2. Section III, Appellant's brief, pp. 29-33, "There was not sufficient evidence warranting submission to the jury of the issue that the defendant aggravated plaintiff's cancer" (See: *Abbott v. Fant, supra*);

3. Section IV, point 2, Appellant's brief, pp. 36-40, "The court erred in permitting expert opinion to be based on improper questions";

4. Section IV, point 4, Appellant's brief, pp. 42-44, "The court erred in permitting expert opinion to be based on improper questions."

Similarly, appellant's contention in Section IV, point 3, pp. 40-42, was not properly raised. There a hypothetical set of facts identical with the development and treatment of plaintiff's condition was stated to a physician and he was asked: "The patient was advised that a physician could do no more for him than was being done by the treatment that I have described." (Defendant made this statement to plaintiff (App. 11, 86)). "What is your opinion with respect to the accuracy of that advice?" Only a general objection was made to the question. No basis for the objection was stated.

Said the Supreme Court of the United States in point in *Burton v. Driggs* (1874) 87 U. S. 125, 20 L. ed. 299, 301:

"It is a rule of law that when a party excepts to the admission of testimony he is bound to state his objections specifically, and in a proceeding for error he is confined to the objection so taken. If he assigns no ground of exception, the mere objection cannot avail him."



See also: *Tucker v. Loew's Theatre & Realty Corp.* (C.C.A. N.Y., 1945), 149 F.2d 677.

(b) DEFENDANT FAILED TO OBJECT TO THE COURT'S INSTRUCTIONS.

Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. 723-c provides in pertinent part:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The only exception made by appellant to the Court's instructions was the allowance by the court of the issue of causation to go to the jury. Appellant cannot now for the first time object to any instruction except where that instruction may have allowed the jury to determine whether or not appellant caused or contributed in causing appellee's cancer.

See: *Cohen v. Evening Star Newspaper Co.* (1940) 72 App. D. C. 258, 113 F.2d 523; *Nunan v. Timberlake* (1936) 66 App. D. C. 150, 85 F.2d 407.

Accordingly, appellant's following arguments fail and do not warrant further argument or refutation by appellee:

1. Section V, Appellant's brief, pp. 44-46, "The evidence was sufficient as a matter of law to show plaintiff's contributory negligence and should bar his recovery";

2. Section VI, Appellant's brief, pp. 46-49, "The trial court's charge to the jury was confusing, misleading and erroneous";

3. Section IV, point 1, Appellant's brief, pp. 33-36, "The test involved is the standard of skill used by dentists." (See also: Sec. III-E, pp. 16-17, post).

See: *Spigel v. Cumenick*, 78 App. D. C. 361, 141 F.2d 19.

*Conclusion:* It would seem that appellant's primary point and the only point which can here be considered on appeal is Appellant's Argument, Section I (Appellant's Brief, pp. 11-26), i. e., whether or not there was sufficient evidence that

defendant caused plaintiff's cancer to allow that issue to be determined by the jury.

It is to this argument that appellee directs the remainder of his brief.

**B. ONLY IF NO REASONABLE MAN COULD REACH A VERDICT IN FAVOR OF THE PLAINTIFF SHOULD THE APPELLANT PREVAIL.**

The law respecting the requisites and the limitations of a directed verdict are well established in this jurisdiction.

This court has recently stated the considerations involved in a directed verdict as follows:

"The court in considering a motion by a defendant for a directed verdict, must construe the evidence most favorably to the plaintiff and give him the full effect of every legitimate inference therefrom. If, upon the evidence so construed, reasonable men might differ, the motion should be denied. On the other hand, if no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted."—*Daniel M. Martin v. Washington Terminal Co.* (March 25, 1947) Vol. LXXV, Wash. Law Rep. 363 and cases cited therein.

In *Gunning v. Cooley* (1929), 281 U. S. 90, 74 L. ed. 720; 58 App. D. C. 304, the defendant in a malpractice action sought reversal on the ground that his motion for a directed verdict at the conclusion of the evidence should have been allowed. Said the Supreme Court in refusing a directed verdict:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence proves all that it may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them \* \* \*."

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly

draw different conclusions from them, the question is not one of law but of fact to be settled by the jury \* \* \*."

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury \* \* \*."

See also: *Weisenberg v. Hazen* (1934) 63, App. D. C. 398, 73 F.2d 318; *Christie v. Callahan* (1941) 75 App. D. C. 133, 124 F.2d 825.

The sole question presented by the appeal, therefore, is, "Could any reasonable and fair-minded man, upon all the evidence of record, reach the conclusion as did the jury, that appellant caused or contributed in causing cancer to appellee's tongue and neck?" If, and only if, all such men should reach a unanimous conclusion to the contrary may appellant, as a matter of law, prevail.

#### C. EVERY REASONABLE INFERENCE DEDUCTIBLE FROM THE EVIDENCE IS ACCEPTED AS TRUE.

That appellant's negligence caused or contributed in causing appellee's cancer is determinable by expert testimony and by circumstantial evidence of record. *Christie v. Callahan* (1941) 75 App. D. C. 133, 147-148, 124 F.2d 825.

The weight to be given to such expert testimony in a malpractice action was discussed by this court in *Christie v. Callahan*, *supra*, as follows, pp. 136-138:

"Malpractice is hard to prove. The physician has all of the advantage of position. He is, presumably, an expert. The patient is a layman. The physician knows what is done and what is its significance. The patient may or may not know what is done. He seldom knows its significance. He judges chiefly by results. The physician has the patient in his confidence, disarmed against suspicion. Physicians, like lawyers, are loathe to testify a fellow craftsman has been negligent, especially when he is highly reputable in professional character, as are these defendants. In short, the physician has the advantage of knowledge and of proof. This increases when he

is a specialist. *What therefore might be slight evidence when there is no such advantage, as in ordinary negligence cases, takes on greater weight in malpractice suits.*" \*

The weight to be given circumstantial evidence in a malpractice action was stated by the court as follows, p. 147:

"Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. *Circumstantial evidence is sufficient, either alone or in combination with direct evidence.*"\* Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inferences drawn must be reasonable. But there is no requirement that the circumstances, to justify the inferences sought, negative every other positive or possible conclusion. The law is not so exacting that it requires proof of negligence or causation by testimony so clear that it excludes every other speculative theory."

The applicable rule of law would seem to be that only experts are qualified to express an opinion as to what causes cancer. But their opinion evidence should be considered together with circumstantial evidence and other evidence of condition and result that would indicate a causal relationship between the appellant's acts and the resulting cancer. *Byrom et al. v. Eastern Dispensary & Casualty Hospital, et al.* (1943) 78 App. D. C. 42, 136 F.2d 278.

It is submitted, therefore, that the function of this court is to determine whether or not the expert testimony and other evidence appearing of record and every reasonable inference deductible therefrom, presents a set of facts upon which all reasonable men must agree that appellant did not cause or contribute in causing appellee's cancer. If there is a disagreement or uncertainty, or if any fair-minded man could upon such evidence reasonably find that appellant did cause or contribute in causing such cancer, then this appeal must fail.

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\* Emphasis supplied.

Only if all reasonable men should disagree with the finding of the jury may appellant prevail.

D. APPELLANT WOULD HAVE THE COURT NOW RE-WEIGH THE EVIDENCE; THIS THE COURT MAY NOT PROPERLY DO.

Appellant would have this court believe that his conduct was proper and in accordance with that which would have been followed by skilled dentists or physicians in this vicinity. The fallacy in this contention is that each authority for defendant's assertions is based upon *appellant's version of the facts*. When the same experts were questioned as to the propriety of appellant's actions under *appellee's version of the facts*, they were unanimous in stating that such conduct was unskillful and not in accordance with accepted dental or medical practices in this vicinity.

The appellant's and appellee's versions of the facts are markedly different and incongruous. In order, then, for this court to consider expert opinion based upon appellant's version of the facts, it must re-weigh the evidence and re-determine the veracity or lack of veracity of appellee and appellant.

Moreover, appellant throughout his brief re-weighs the evidence, and argues that the weight of the evidence is in his favor. It is not the function of this court to weigh the evidence and to usurp the functions of the jury; its function here is to determine whether there was, as a matter of law, sufficient evidence of record to allow the issue of causation to be considered by the jury. *Christie v. Callahan* (1941) 75 App. D. C. 133, 124 F.2d 825.

The effort by appellant to argue for preponderance of evidence is particularly evident in his arguments respecting:

(1) Whether or not chronic friction and irritation cause cancer (Appellant's Brief, pp. 9, 16-20);

(2) Whether or not plaintiff's tongue was cancerous when he first consulted defendant (Appellant's Brief, pp. 16-18, 19, 26-27);



(3) Whether or not plaintiff's dentures were negligently constructed and fitted by defendant (Appellant's Brief, pp. 9, 13-16);

(4) Whether or not the misfitting dentures caused plaintiff's cancer (Appellant's Brief, pp. 9, 13-16);

(5) Whether or not the daily application of metaphen under defendant's direction caused or contributed in causing plaintiff's cancer (Appellant's Brief, pp. 11-13, 33);

(6) Whether or not defendant was professionally negligent in prescribing that plaintiff expose himself to chronic irritation, and in failing to advise medical consultation (Appellant's Brief, pp. 20, 28-29);

(7) Whether or not defendant held himself out and undertook to exercise the degree of skill and ability normally exercised by an ordinary physician in this vicinity (Appellant's Brief, pp. 9, 34-36, 50).

Appellant's arguments are refuted (even on the basis of preponderance of evidence) by the portions of the record grouped under the respective headings in the Appendix hereto, pp. 19-44.

#### E. APPELLANT MISCONSTRUES THE RECORD; APPELLEE'S TONGUE BECAME CANCEROUS AFTER APPELLANT TREATED APPELLEE'S TONGUE.

Appellant misconstrues the record in his contention that appellee's cancer was present before appellee consulted appellant. Hereinafter is quoted the testimony upon which appellant relies (Appellant's Brief, pp. 17, 18):

*Dr. Maurice Kossow*—cross examination by Mr. Cummins:

"Q. Now, assuming that the area there had been sore for one year from June 25th of 1945, that is one year previous, what is your opinion as to when the cancerous



condition first developed in the patient's month? [Note: June 25, 1945, is the date Dr. Kossow first examined plaintiff.]

A. At least a year.

Q. At least a year?

A. Yes, sir.

Q. So, on your direct examination when you stated that it had been apparent several months, after I informed you of this fact, your opinion is that now that at least a year, that condition . . .

A. (Interposing) You gave me a hypothetical question. There is a difference.

Q. Please let me ask a question, Doctor.

A. I mean, I answered because you gave me a hypothetical question. *You said assuming the lesion was there for a year. How long was it there? And naturally, it was a year. You answered your own question.*

Mr. Cummins: Don't be argumentative—

The Court: *I think he has a right to, when he was asked that hypothetical question."*

It is rather obvious that the witness has not here testified that *cancer* of plaintiff's mouth had been present before September 15, 1944.

A typographical error, or error by the witness in stating the year, apparently confused appellant in citing the following (Appellant's Brief, p. 17):

*Dr. Maurice Kossow*—cross examination by Mr. Cummins:

"Q. Assuming that your patient, Mr. Sternal, had pain in the immediate area of the tongue, that was cancerous when you first saw it; assuming that this pain was first noticed by the patient on July 15, 1944; and further assuming that in one month it was large as a pinhead; and on the 16th of September, the second month, it was large as the sulphur on the end of a house match; further assuming you found that condition on his first visit to you, what is your opinion as to when the cancerous condition first developed?

A. Probably prior to July, 1944, *when I first saw him.* Does that answer your question?"

[Note: Dr. Kossow first saw plaintiff in July, 1945, not 1944; it is rather obvious that his reply meant 1945.]

There is no basis in the record for appellant's assertion that cancer had its inception before defendant's treatment began (Appellant's Brief, pp. 9, 17-19). The record shows that appellee's tongue became cancerous from three to six months after such treatment began (App. 69-70).

F. APPELLANT UNDERTOOK TO EXERCISE THE SKILL AND CARE OF A PHYSICIAN IN TREATING AND PRESCRIBING FOR APPELLEE'S TONGUE.

In undertaking to treat appellee's tongue, appellant, by word and by deed, assured appellee that he was qualified to treat the tongue; that there was nothing a physician could do for him (appellee), that appellant could not do; that the advice of a physician was not necessary, and that appellant knew what he was doing and was prescribing by virtue of his experience at the Mayo Clinic (App. 86-90). As a result, appellant is held to that degree of skill he professed to have and undertook to exercise. Appellant undertook in treating and prescribing for appellee's tongue to exercise the degree and skill not of a dentist, but of an ordinary physician practicing in the District of Columbia. In constructing the dentures, appellant would seem to be held to the degree of skill and care incumbent upon a dentist.

The trial court correctly charged the jury in substance that if they should find that appellant held himself out to appellee as possessed of the skill and ability of a physician, and undertook to exercise such skill in treating and prescribing for appellee's tongue, then as to such treatment he is held to the standards of skill and care exercised generally by ordinary physicians practicing in the District of Columbia.

See: *Sweeney v. Erving* (1910) 35 App. D. C. 57, aff'd. 228 U. S. 233, 57 L. ed. 815; *Brown v. Shyne* (1926) 242 N. Y. 176, 151 N. E. 197; *Treptau v. Behrens Spa* (1946) 247 Wisc. 438, 20 N. W. 2d 108.

Appellant did not object to this charge. The only purpose of its discussion here is to assist this court in applying the

proper standards of skill and care incumbent upon appellant.

As appears hereinafter (App. 69-70), appellant in treating appellee's tongue, in prescribing appellee's use of chronic irritants, and in directing that medical advice not be sought, neither exercised the degree of skill and care incumbent upon physicians nor upon dentists in this vicinity.

G. APPELLANT CAUSED CANCER TO APPELLEE BY NEGLIGENTLY CONSTRUCTING AND FITTING APPELLEE'S DENTURES, BY NEGLIGENTLY PRESCRIBING THAT APPELLEE EXPOSE HIMSELF TO CHRONIC FRICTION AND IRRITATION AND BY NEGLIGENTLY FAILING TO SEEK THE CONSULTATION OF A PHYSICIAN.

There are three lines of reasoning upon which reasonable men could find, as they have, that appellant caused or contributed in causing cancer to appellee:

*First:* Appellant negligently and without due care and skill constructed and fitted a set of false teeth for appellee. The chronic friction and irritation caused by such defective dentures resulted in cancer to appellee.

*Second:* Appellant negligently and without due professional care and skill prescribed and insisted, for nine months, that appellee expose himself to two irritating forces, misfitting dentures and metaphen. As a result of such chronic friction and irritation, cancer was caused to appellee.

*Third:* Appellant negligently and without due professional care and skill prescribed that appellee do not seek the advice of a physician. Had a physician been so consulted when the condition of appellee's tongue was a scratch or an ulceration, cancer would either have been prevented entirely, or would have been much less severe.\*

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\* Appellant was also negligent (under the degree of skill and care he undertook to exercise) in failing to diagnose appellee's condition as cancer so as to have adequate treatment instituted earlier (App. 80-90).

## H. THE RECORD ITSELF ASSERTS AND SUSTAINS APPELLEE'S POSITION.

Because of the nature of the issue presented, appellee shall let the record speak without further argument. Hereinafter, under appropriate headings in the Appendix, appear portions of the record upon which the lower court correctly allowed the jury to determine the issue of whether or not appellant caused or contributed in causing appellee's cancer. "*Prout patet per recordum.*" \*

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\* Because the Appendix also constitutes Appellee's argument, each page is given two numbers; one for the argument and a second for the Appendix.

## IV. APPENDIX

## A. CHRONIC FRICTION AND IRRITATION CAUSES CANCER.

*Dr. Maurice Kossow*—direct examination, by Mr. Fegan:

- 157 Q. What have you found to be the generally accepted cause of cancer? A. Now, speaking generally, we all know—we don't know the cause of all cancers, but we do know the causes of some of the cancers. I will explain to you what I mean.

*We know, for instance, that irritation is a causation of cancer, and we can prove it by lots of facts.\** For instance, we know that cancer of the lip, from pipe smokers, particularly clay pipes, people who smoke clay pipes that are rough, they have rough edges and cause constant and continuous irritation of the lip, and eventually a great percentage of those people develop cancer of the lip.

You know, for instance, that people who have syphilis of the tongue, with its ulcer formation, eventually, with constant and chronic irritation, eventually may give rise to cancer of the tongue.

*We know that plates, dental plates which are ill-fitting will give rise to cancer \** in a much larger majority of patients than those who never had a dental plate.

To prove that irritation is a cause of cancer, I can say, for instance, take the fisherman in Scotland, in the olden days, who used to use a whalebone needle, and tarred thread, in order to sew up his nets. Well, they had a habit of sticking the needle in their mouth, and their lips came in touch with the thread that was tarred, and tar, we know, is a carcinogenic agent, and those people had cancer of the lips.

As an interesting item, for instance, about the natives of Kashmere, in Asia, it shows—who had a habit of

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\* Emphasis throughout this Appendix is supplied.

158 carrying a basket of hot coals under their clothes in wintertime, they developed cancer of the abdominal wall, and that is a very rare site of cancer. You will probably go through a lifetime without seeing, ever seeing a cancer of the abdominal wall, and here we have the natives of a certain part of Asia who, for some reason or other, a large percentage have cancer of the abdominal wall, and there was an investigation which disclosed the constant irritation of the outside abdominal wall, caused by the basket of hot coals they carried under their clothes.

Those are some of the factors which tend to prove that irritation, chronic irritation, is a causation of cancer.

Now, *we can produce cancer, experimentally*, by taking a rabbit's ear, and rubbing it with tar, some form of coal tar product will produce cancer of a rabbit's ear. The same thing applies to mice.

In other words, *we know that a chronic irritation can be taken and we can produce cancer experimentally*. That is all the proof I know to give you.

Q. What forms of irritation did you notice, if any, in Mr. Sternal's mouth? A. Well, *the plate is the only thing I saw he had*.

Q. That is the only form of irritation or possible  
159 source that you saw? A. *The only possible source was the denture*.

\* \* \* \* \*

*Dr. Oscar B. Hunter*—direct examination, by Mr. Fegan:

208 Q. Doctor, in laymen's language, what is cancer?

209 A. Well, cancer is a disease of unknown etiology, unknown cause. It is very widespread throughout the human race and is also very common in animals. It manifests itself in many different ways, but *usually follows some irritation*, long-standing infection, or frequently follows a burn or sometimes develops without any previous known cause whatsoever.

\* \* \* \* \*



Dr. Daniel Lynch—cross examination, by Mr. Fegan:

267 Q. Doctor, why is it so important not to irritate the tissues of the mouth? A. Well, *it is important not to irritate the tissues* in any place, mouth, or any place, because you get a response from the tissue which—*any cell will respond to an irritation*, and the response will be inflammatory, or it can be transitory, or it can be prolonged, sustained.

*There is a great deal of difference between a transitory irritation and a chronic irritation, it makes a lot of difference.*

Q. What is the difference between the two? A. Well, a transit irritation may only produce temporary inflammation of the tissue without any abscess formation—  
268 take away the irritation, the whole thing disappears.

On the other hand, a chronic irritation over a long, prolonged period of time, would produce what we call hypertrophied tissue. That is overproduction of cells in that area. Not necessarily is it cancerous, because we see a tremendous amount of that kind of thing in the mouth, especially from ill-fitting dentures—hypertrophic tissues, and fibrous type of tissue, somewhat like scar tissue, when you cut your hand and the tissue heals, you will have a little white line appear. That is scar tissue.

Q. You say that it would not necessarily be cancerous? A. That is right.

Q. You mean it could be cancerous? A. *It has been proved that prolonged chronic irritation of a denture or anything else in the mouth can produce cancer, but it is over a long period of time.*

Q. Now, *would an ill-fitting denture that rubbed against a previous cut on the tongue for nine months, would you consider that a chronic irritation?* A. Well, *I would consider that a chronic irritation, I wouldn't say it was passing.*

\* \* \* \* \*

- B. PLAINTIFF CONTRACTED CANCER WHILE HE WAS UNDER DEFENDANT'S CARE; HIS TONGUE WAS NOT CANCEROUS WHEN HE FIRST CONSULTED DEFENDANT.

*Dr. Oscar B. Hunter*—direct examination, by Mr. Fegan:

- 213 Q. Well, Doctor, could this condition have become apparent as cancer overnight, like measles, or was it a more gradual process of growth? A. Oh, no. Cancer does not grow that way. Cancer grows, even the most rapidly, the most rapidly growing and most malignant ones, take time to develop.

Q. And by time, how much? A. I would say *three months*, or more.

Q. Then in your opinion, approximately how long was Mr. Sternal's condition discernible or apparent? A. Well, at the time I saw it, I couldn't say how long it had been discernible beforehand, without I knew the complete antecedent history, but the tissues at the time, and *the indications were that there had been a previous, some previous ulceration, or some previous induration and that cancer had developed in it and that it had been existing there for some little while, say a number of weeks or a number of months.*

\* \* \* \* \*

*Dr. Oscar B. Hunter*—cross examination, by Mr. Cummins:

- 222 Q. Assume that Mr. Sternal complained of pain on his tongue on July 15, 1944, and that that spot became enlarged to the size of a pinhead one month later; and that same area grew to the size of the sulphur end of a house match in an additional one month, namely by September 15, 1944; and assume that that spot was examined by you and you found that condition in the following July, 1945, and during this period of time, Mr. Sternal's mouth, in that area alone, was very painful—

what is your opinion as to the date, or approximate date that cancer first developed in Mr. Sternal's mouth?

\* \* \* \* \*

223 A. As I previously testified, it would be a little difficult to tell exactly when this cancer developed, because of the fact that when I saw it, and examined it, there was an ulceration, and a considerable amount of enduration, and it would be necessary to have some consideration of the antecedent facts in connection with it. What you tell me tends to prove to my own mind what I suspected, that *this lesion possibly began as some sort of ulcer of some endured or affected area beforehand, and subsequently became cancerous* because in the examination of the tissue, we suspected that it was there, had been there for some time, but *I would estimate that between three and six months,\** because it was a relatively rapid growing cancer and if it had been present from the very beginning the probability was that it would have been very extensively endured into his neck at the time I saw him.

\* \* \* \* \*

Dr. Maurice Kossow—direct examination, by Mr. Fegan:

164 Q. Well, Doctor, let's state it this way: When you first saw Mr. Sternal,\*\* approximately how long previously should cancer have reasonably been apparent or discernible? A. Oh, I would say for *several months*.

\* \* \* \* \*

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\* Appellant had been treating appellee then for ten months.

\*\* July, 1945.

C. THE DENTURES WERE NEGLIGENTLY CONSTRUCTED BY DEFENDANT AND IRRITATED PLAINTIFF'S TONGUE FOR LONGER THAN NINE MONTHS.

*Mr. Paul Sternal* (Plaintiff)—direct examination, by  
Mr. Fegan:

27 Q. Now, you mentioned earlier, I believe, your first  
set of dentures were not satisfactory. What was wrong  
28 with them? A. *They kept on irritating that wound*  
which Dr. Kasmer positively promised me, at the first  
visit, to eliminate that friction that kept my wound  
open, and failed in accomplishing that purpose, and  
that is the reason why the first set of teeth was not  
satisfactory.

Q. Now, will you describe in detail, if you will, how  
these dentures irritated your gums? A. Because, sir,  
he had the teeth in there, he did not have any particular  
sharp prongs or points, but the edges of the teeth *both*  
*on the uppers, as well as the lowers, were rubbing against*  
*my tongue*, especially where, by this time, the enlarged  
wound was, and it gave me untold trouble while speak-  
ing and eating. As a matter of fact, while eating I had  
to take the whole thing out and mash my food with a  
fork and swallow it that way because I couldn't use  
those teeth.

Q. How long did you wear those teeth? A. Well, as  
I said before, the most I could wear them was six hours  
at a time—with unusual effort, I could keep them in  
my mouth.

Q. Now, over what period of time, I believe you testi-  
fied— A. From the time he had them ready for ad-  
justment, about the middle or end of November, 1944,  
until about the end of March, 1945,\* when it came to a  
showdown. I was awful sick. I said, "*Doctor, you*

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\* This was later confirmed as being June, 1945.

- 29 *haven't fulfilled your promise. You have not eliminated that friction which keeps the wound open,"* and it was at that juncture where he said, *"Well, we will discard that set of teeth and make a new set of teeth."*

Q. Was that the only time you ever discussed this irritation of the first set of false teeth? A. No. I kept on mentioning it to him, but he kept on assuaging me. He says, "Everybody has to suffer that way. You have got to get accustomed to these pains, and just don't put so much concentration on your tongue, the pains in the tongue, but concentrate on my 'work'."

Q. When did he say that? A. After the time you asked me when did he say these things, from the time that he started to make an adjustment on my teeth, I complained that I couldn't wear them, they hurt, and he kept on telling me, "Use your teeth," he didn't say those words, but making me believe I was a cry-baby, I couldn't stand the pain. He said, "Everybody has got to suffer that pain like that. *Your mouth will get gradually accustomed to those pains* and before you know it, you will have your teeth in your mouth and won't know it at all."

Those were the conversations that he had with me, and he kept on patting me on the shoulder and says, *"Just forget the teeth, forget the tongue, and wear the teeth."*

\* \* \* \* \*

- 30 Q. What future course of procedure did Dr. Kasmer prescribe? A. What future course? Well, he proposed to make another set of teeth, dental plates for me, *because the friction still existed with his so far unfinished plates.* He proposed to make me a new set of teeth without teeth on the left side.

Q. What did he say when he made that proposal? A. He said, "You keep on using the metaphen, as I

have told you, and *I will definitely give you a set of teeth where the friction will be eliminated.*"

Q. He did say that? A. He did say that.

\* \* \* \* \*

31 Q. Now, would you show us on this denture exactly where it rubbed against your tongue, Mr. Sternal? A. As I have that in mouth this way (indicating) these edges here, together with *the edges of the upper jaw were constantly rubbing against my tongue.* The wound in my tongue was there, and he tried to eliminate that friction by filing this down (indicating), which one can see the difference of the edges of the teeth here as well as there.

\* \* \* \* \*

45 Q. What discussion, if any, did you have with Dr. Kasmer respecting the failure of this cut to heal?

\* \* \* \* \*

A. The first time I brought up the point was when he was adjusting the plates to my gums which was toward the end of October, and then I brought it up at almost every visit I made to him, every subsequent visit I made to him, and I called that to his attention.

\* \* \* \* \*

*Dr. A. P. Kasmer* (Defendant)—direct examination, by Mr. Cummins:

297 Q. Tell the court and jury the conversations between you and Mr. Sternal on that date,\* and what you agreed to do, if anything? A. Well, at that time I noticed that the inflammation of his tongue, hadn't healed to any extent whatsoever, and I suggested at that time that it would be advisable to make him a new set of

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\* The time the second set of teeth was completed was approximately two weeks before cancer was discovered (June 26, 1945).



dentures so as to remove the teeth on the left side of his mouth because *I thought possibly the teeth might*  
298 *be rubbing against his tongue, or the tongue might be*  
*rubbing against the teeth* in its excursions in the mouth.  
and I suggested that he see a physician at once.

\* \* \* \* \*

308 Q. Why was it necessary for you to make a second  
set of false teeth? A. The second set of false teeth  
were made primarily, to remove the teeth on the lower  
309 left side of his mouth, and the two upper teeth on the  
right side of the mouth *so that they would not aggra-*  
*vate his tongue.* It was a temporary expedient, and I  
told him so.

\* \* \* \* \*

312 Q. Doctor, what types of ulcerations are there? A.  
I would rather not say, because I am not qualified to  
discuss them.

Q. Would this—— A. Do you mean in the teeth?

Q. In the tongue. A. I do not know.

Q. Could I recall your memory by this statement?  
“I have since removed the impacted tooth and treated  
the ulceration of the tongue.” \*

\* \* \* \* \*

313 Q. What kind of ulceration did you believe Mr.  
Sternal had? A. I don't know—never explored it and  
never looked at it closely enough to diagnose it.

\* \* \* \* \*

320 Q. Doctor, do you recall, in that same deposition,  
the following question: “Why was it necessary to make

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\* Quoted from a statement given plaintiff by defendant on June 16, 1945,  
for presentation to plaintiff's employer.

the new set of plates?" And in answer—we were then discussing the second set of plates you made—and in answer, you said: "At that time *I decided it might be best to remove the teeth on the upper and lower, on the left side, so that it would relieve the irritation on the tongue.*"

Do you recall that statement? A. That is right.

Mr. Fegan: That is all.

The Witness: May I amplify that?

Mr. Cummins: Go ahead.

The Witness: I meant that *it would relieve the irritation temporarily*. That is, at that time when I saw Mr. Sternal, June 16th, a period of over three months had elapsed that I did not see him, had not seen Mr. Sternal. Then between November the 19th and June the 16th, I saw Mr. Sternal only on one occasion, March 3rd.

- 321 Now, when he came in March 3rd, I saw no difference in the condition of his tongue. On the 16th of June, however, I noticed that the irritation was in worse condition, and consequently decided, at that time, to remove the teeth on the left side of the mouth *as a temporary relief, and to make sure that there would be no irritation*; but I did advise the patient, definitely, to see a physician at that time; but the removal of the teeth on the left side *was primarily to relieve the irritation that the teeth may be causing*, but I saw definitely that at that time it was worse than when I had seen him three or three and a half months previously, and certainly much worse than it was when I dismissed the patient on the 19th of November. So, I advised the patient, at that time, that it would be best to remove the teeth on the left side *so that it would remove a possible source of irritation, if that was causing irritation*. I wouldn't say definitely if it was or wasn't. I felt that I was not qualified to judge that, so I felt it would be

best, as a temporary expedient to remove the teeth on that side, and see to it that the patient—and advise the patient to go to a physician.\*

\* \* \* \* \*

*Dr. Maurice Kossow*—cross examination, by Mr. Cummins:

- 199 Q. Could the natural teeth irritate a cancer condition  
of the tongue in the same part of the tongue that Mr.  
200 Sternal's cancer was located? A. *No, sir, not unless  
those teeth were abnormal. Natural normal teeth would  
not irritate it.*

\* \* \* \* \*

*Mr. Paul Sternal* (Plaintiff)—direct examination, by Mr. Fegan:

- 31 Q. This is the first set of teeth that Mr. Kasmer—  
A. Yes, and you can notice on there that he tried to  
file down the edges.

\* \* \* \* \*

*Dr. Daniel Lynch*—direct examination, by Mr. Cummins:

- 264 A. \* \* \* It isn't just cutting the edge down, but it  
*must be polished and rounded over so as not to irritate  
the tissue.* \* \* \*

\* \* \* \* \*

#### D. THE MISFITTING DENTURES CAUSED CANCER TO PLAINTIFF.

*Dr. Maurice Kossow*—direct examination, by Mr. Fegan:

- 158 Q. What forms of irritation did you notice, if any,  
in Mr. Sternal's mouth? A. *Well, the plate is the only  
thing I saw he had.*

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\* Plaintiff testified that he was under constant care by defendant and that defendant never advised his seeing a physician. In fact, defendant advised plaintiff *not* to see a physician (App. 86-90).

Q. That is the only form of irritation or possible  
159 source that you saw? A. *Only possible source was the denture.*

\* \* \* \* \*

Cross examination—by Mr. Cummins:

196 Q. Now, when you noticed the patient's mouth for the first time, did you observe any condition, that is, of your own personal knowledge, which had aggravated the lesion on his tongue? A. *The only thing that I saw was the dental plate.*

Q. Now, did you notice any condition that had aggravated the lesion? A. *I noticed a thing, not a condition—the thing was a dental plate.*

\* \* \* \* \*

199 Q. Could the natural teeth irritate a cancer condition of the tongue, in the same part of the tongue that Mr.  
201 Sternal's cancer was located? A. No, sir, not unless those teeth were abnormal. *Natural, normal teeth would not irritate it.*

\* \* \* \* \*

Dr. Daniel Lynch—cross examination, by Mr. Fegan:

268 A. *It has been proved that prolonged chronic irritation of a denture or anything else in the mouth can produce cancer, but it is over a long period of time.*

Q. Now, would an ill-fitting denture that rubbed against a previous cut on the tongue for nine months, would you consider that a chronic irritation? A. Well, *I would consider that a chronic irritation, I wouldn't say it was passing.*

E. IRRITATION CAUSED BY THE PROLONGED APPLICATION OF METAPHEN UNDER DEFENDANT'S DIRECTIONS CAUSED OR CONTRIBUTED IN CAUSING PLAINTIFF'S CANCER.

Mr. Paul Sternal (Plaintiff)—direct examination, by Mr. Fegan:

- 13 Q. What course of procedure, if any, did he suggest  
14 or advise? A. He told me, to cure this trouble, it would be necessary first to remove the cause, which he would attend to by giving me a new set of teeth, false teeth of course; and, for me to attend to the following:

He gave me a prescription which consisted of a medication which I never heard of before, but he put it down on a piece of paper, and this medicine, the name of that is metaphen, and he told me how to apply it, went into detail as to how to make a swab from a match, put the cotton on one end, soak that in that metaphen, and put that right into that scratch or that wound of the tongue. *He said, "It will smart, it will hurt, but just stand the pain, and when you are through drenching that inner part of your wound, put that metaphen all over the tongue, and do that three times a day, besides your other ablutions with the salt water, or a solution of aspirin that you occasionally take during the day."*

Q. Were these instructions followed by you? A. To the letter, except on some occasions when I was sick, that I couldn't *put that smarting and biting metaphen into my tongue because every time I did that, it gave me excruciating pain and it caused that wound to bleed.*

Q. Over how long a period did you apply this metaphen to your tongue? A. As long as I have been under this treatment, because *he insisted on me using the metaphen almost religiously.*

- 14 Q. Over how long a period was that? A. From the first visit, which was September 15th, to July; rather let's say June 26.

\* \* \* \* \*

- 22 Q. And how many visits did you make to Dr. Kasmer? A. Not less than 27.

\* \* \* \* \*

*Dr. Maurice Kossow*—cross examination, by Mr. Cummins:

- 201 Q. Would a mere application of metaphen, for a period of say one week,\* *aggravate a cancerous condition?* A. For a period of one week, I would say no.

Q. Is it not a fact that it would do it more harm than it did good? A. That metaphen—

Q. For a period of *one week*,\* it would do more good than harm? A. *I know it wouldn't do any good.*

- 202 Q. Wouldn't do it any harm? A. *May do it harm,* but wouldn't do it any good.

Q. First you said it wouldn't do it any harm. A. For a period of one week,\* but I do know it wouldn't do it any good, I suppose for a week probably it wouldn't do any harm.

\* \* \* \* \*

*Dr. Oscar B. Hunter*—direct examination, by Mr. Fegan:

- 214 Q. What effect, if any, would the daily application of metaphen to Mr. Sternal's tongue, three times daily, over a period of nine months, have had on the course of the development of the lesion which you saw? A. The daily application of—

- 215 Q. Metaphen. A. Metaphen? Was it full strength or diluted, or what? Ordinarily, though—

Q. Would you give me it in both manners?

Mr. Cummins: I think the doctor started to answer and was interrupted. He said ordinarily—

A. (continuing): Ordinarily, metaphen, even in full strength can be applied to tissues and ulcers without

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\* Defendant prescribed metaphen three times daily for *nine months* (App. 31).



any deleterious effect. *If it is applied continuously, it may produce some irritation.*

\* \* \* \* \*

*Dr. Maurice Kossow*—direct examination, by Mr. Fegan:

- 174 Q. Why do you consider it wrong, Doctor? A. *Because the doctor would not have treated a man with metaphen all that time. He would not have done the thing you said.*

\* \* \* \* \*

F. DEFENDANT WAS PROFESSIONALLY NEGLIGENT IN PRESCRIBING THAT PLAINTIFF EXPOSE HIMSELF TO PROLONGED CHRONIC IRRITATION AND IN FAILING TO ADVISE MEDICAL CONSULTATION AFTER THE CONDITION FAILED TO RESPOND TO TREATMENT.

*Mr. Paul Sternal* (Plaintiff)—direct examination, by Mr. Fegan:

- 29 Q. Was that the only time you ever discussed this irritation of the first set of false teeth? A. No, I kept on mentioning it to him, then he kept on assuaging me. He says, "Everybody has to suffer that way. You have got to get accustomed to these pains, and just do not put so much concentration on your tongue, the pains in the tongue, but concentrate on my work."

Q. When did he say that? A. After the time—you asked me when did he say these things, from the time that he started to make an adjustment on my teeth I complained that I can't wear them, they hurt, and he kept on telling me, "Use your teeth," he didn't say those words, but making me believe I was a cry baby, I couldn't stand the pain. He said, "Everybody has got to suffer that pain like that. Your mouth will get gradually accustomed to those pains and before you know it you will have your teeth in your mouth and won't know it at all."

Those were the conversations that he had with me, and he kept on patting me on the shoulder and says, "Just forget the teeth, forget the tongue, and wear the teeth."

\* \* \* \* \*

30 Q. What future course of procedure did Dr. Kasmer prescribe? A. Well, he proposed to make another set of teeth, dental plates for me, because the friction still existed with his so far unfinished plates. He proposed to make me a new set of teeth on the left side.

36 Q. When was the first time you noticed this hardness? A. I again can not definitely pin myself to definite dates, but it was about January.

Q. Did you ever discuss that hardened condition with Dr. Kasmer? A. On one of the first visits when he examined my tongue, I mentioned it, "What does that mean? Do you know that it is hard there?" to which he did not react. He as much as indicated to me, it doesn't mean anything, and I never made an issue of it.

\* \* \* \* \*

45 Q. Do you recall what you said and what Dr. Kasmer said on those occasions? A. With respect to what?

Q. To the failure of your tongue to heal. A. Oh, he expressed concern in a general way. I said, "Doctor, you said the tongue would heal up if I continued to use your prescription of metaphen, which I have been doing to the best of my ability; you said you will attend to your end of it by giving me a set of teeth that will not rub against the open wound in the tongue, but that that friction would be eliminated, but we are not making any headway."

46 Q. And what did Dr. Kasmer say when you said that? A. Well, he made—he said, in effect, that I was thinking too much of my wound in the tongue, that I should forget the tongue, other than do just what he asked me

to do in applying the metaphen—he said forget the tongue.

Q. And when did Dr. Kasmer say that? A. He said it on several occasions, several visits when I expressed concern about the tongue not healing, the wound in the tongue not healing.

\* \* \* \* \*

*Dr. Maurice Kossow—direct examination, by Mr. Fegan:*

- 159 Q. Assuming, Doctor, that Mr. Sternal wore false teeth that rubbed and irritated this lesion on his tongue from October through May, prior to your seeing him. In your opinion, would it have been a skillful or an unskillful practice for an ordinary practicing physician, in this vicinity, to have insisted that Mr. Sternal wear such teeth constantly during that period?

\* \* \* \* \*

- 162 A. Assuming that—*I would say it was unskillful.*

Q. And why? A. If that is what you want to know.

Q. Why, in your opinion, would such advice be unskillful? A. Well, you are assuming, that a dental plate acted as a constant irritation, and *there the idea would be to remove the source of irritation.*

\* \* \* \* \*

- 164 Q. When you first saw Mr. Sternal's condition, what was your opinion, based upon your experience, and other facts that you observed, with respect to whether or not Mr. Sternal had been given the care and attention of a physician, ordinarily employed by a physician of ordinary skill and ability in the District of Columbia? A. No, sir, *he was not given the care and attention of a physician in the District of Columbia.*

Q. And why do you say that he had not been given such care and skill? A. Because I think any physician in the District of Columbia *would have detected that*

thing much earlier and *would have taken steps to institute treatment much earlier.*

\* \* \* \* \*

*Dr. Oscar B. Hunter*—direct examination, by Mr. Fegan:

- 216 Q. Would an average physician in the District of Columbia be utilizing ordinary skill and ability if, for nine months, prior to your seeing Mr. Sternal, the physician had prescribed the daily application of metaphen. and had insisted that he wear false teeth that rubbed against the cut on his tongue? A. Well, that is a typical—difficult question to answer. It would all depend upon the facts that presented themselves to the physician at the time of the examination. It would be my impression, and I think the impression of most physicians, as if they have a lesion that does not heal, a sore
- 217 *that does not heal in a reasonably short period of time,* then the next thing to do is to have it examined *to find out why* or to take such other measures or examine other parts of the body *to see what might be wrong,* either bacteriologically or by a direct complete tissue examination of the lesion, itself.

\* \* \* \* \*

*Dr. Daniel Lynch*—direct examination, by Mr. Cummins:

- 256 Q. Now, Doctor, I desire to ask you a hypothetical question: Assume a man, aged 69 years, sought dental services from a dentist in this jurisdiction, and after a conference, requested the dentist to make him a full upper denture and a lower partial denture; and further assume, meaning that on the first visit the patient made to the dentist, that there was a small sore on the tongue which appeared to the naked eye as being no larger than the sulphur on the head of a household match; and further supposing that at that time he gave the past history to the dentist that before then he had punctured his

257 tongue by biting his tongue—if under these conditions the dentist prescribed the use of a substance known as metaphen for that tongue condition—would such an act on the part of the dentist be the usual and general practice among dentists? A. Well, a dentist might use something else, but generally that would be the procedure *and then keep it under observation.*

Q. Yes. Now having the same patient in mind and having in mind that the first visit was on September 20, 1944, and when the dentist put the dentures into the patient's mouth, October 9, 1944, the patient then complained of pain in his tongue, at that time, the dentist informed the patient to immediately see a physician\* but until he could see a physician, to swab the lesion with metaphen three times a day—would that instruction by the dentist, and that care of the dentist be the usual and accepted practice in this jurisdiction?

\* \* \* \* \*

A. We do something like that. In other words, if we look at a wound—when you first look at a sore in the mouth, you can't always tell what there is at first, you have to see it maybe two or three times;\*\* but in the meantime you can't leave it alone. You will prescribe some medication *that will not aggravate the condition* but may sterilize it temporarily and that may stimulate  
258 healing; but a wound in the mouth that doesn't heal after, say, observing it over a period of time, then *the smart thing to do is refer the patient to someone who specializes exclusively* in that, or to a competent man, either in medicine or oral surgery, or to a skin man, or to get consultation yourself with an expert. That is the usual procedure.

\* \* \* \* \*

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\* Plaintiff denied that defendant ever advised his seeing a physician and in fact advised against seeking medical advice (App. 86-90).

\*\* Defendant treated plaintiff more than 27 times (App. 78).

*Dr. Daniel Lynch*—cross examination, by Mr. Fegan:

- 268 Q. Doctor, assuming that a patient came to a dentist  
and that that patient then had a small lesion on his  
tongue about the size of the head of a match; and fur-  
269 ther assuming that that dentist treated the cut by the  
application of metaphen, and other medication; and  
assuming that the dentist treated this patient for a  
period of nine months, and that during that time, this  
cut grew from the size of a match to the size of the tip  
of your thumb, and that the cut became hard around  
the edges, inflamed, painful, discolored—in your opinion,  
would or would not that dentist be skillful or unskillful  
in continuing to treat that patient during that entire  
period? A. Well, I would advise the patient—I *would*  
*want a consultation* for one thing, in my particular spe-  
cialty, and *I would also want the patient's physician in*  
*on the case*, too, because we make it a practice, wherever  
there is anything that is prolonged, liable to be some  
systemic effect, to even have the patient's family physi-  
cian in on the case, anyhow. You never know what is  
going to develop, systemically, do you, and your ques-  
tion—

?

\* \* \* \* \*

- 275 Q. Doctor, in your opinion, what is the function of  
the dentist in the diagnosis of cancer? A. *All dentists*  
*graduating from school receive a course in diseases of*  
*the mouth, and among the diseases that are discussed*  
*extensively, is cancer. They make a particular point of*  
*it in dental schools, to differentiate between the three*  
276 *lesions that look alike, tuberculosis, ulcers of a syphilitic*  
*origin, and cancers. They look alike clinically, but it*  
*takes an expert, a certain amount of skill to make the*  
*differential diagnosis. I personally don't think that the*  
*average general practitioner has that skill unless the*  
*case is what we call a textbook picture, and today, in*  
*practice, you don't see those classical textbook pictures*  
*any more, because the patients are receiving better diag-*



noses, better diagnostic skill. In other words, they are going earlier than they used to.

Q. Earlier, to whom? A. To the doctors.

Q. To the doctors? A. That is right.

Q. And what advantage have you learned there is in going earlier to the doctor? A. The advantage is that *a lesion or anything that doesn't respond to the ordinary treatment, that a patient should be advised to see a physician or a consultant in the field.*

Q. And that is the reason that the dentists are taught concerning cancer, is it not? A. That is right. *They are taught in order to make a differential diagnosis and be able to recognize their limitations and lesions, at least recognize their own limitations.*

277 Q. At least suspect it? A. Yes, you have to suspect everything—you have to suspect everything.

\* \* \* \* \*

*Dr. Maurice Kossow*—direct examination, by Mr. Fegan:

164 Q. What have you found to be the generally accepted method of treating cancer, cancer of the tongue? A. Well, deep X-ray therapy, radium, and eventually and finally, surgery. I mean, in that order. In other words, if it is an early—in the early stages, deep X-ray therapy may suffice; in the later stage, he may have to use radium, and, finally, surgery.

G. DEFENDANT HELD HIMSELF OUT AND UNDERTOOK TO EXERCISE THE DEGREE OF SKILL AND ABILITY NORMALLY EMPLOYED BY A PHYSICIAN.

*Mr. Paul Sternal* (Plaintiff)—direct examination, by Mr. Fegan:

16 Q. Now, what conversation, if any, did you have during your first visit respecting the condition of your tongue? A. What conversation I had?

Q. With Dr. Kasmer. A. When he told me what his method of curing my trouble would be, or what they are, I asked him if it wouldn't be advisable to ascertain definitely from another physician, or from a clinical laboratory, what the nature of the wound in the tongue really was, so that we knew what we are doing. He poo-pooed that. He said, "*There is nothing serious about this tongue, there is nothing that a physician could do there but what I can't possibly attend to,*" and he proceeded to give me the ways and means of how to cure my trouble.

Q. Now, tell me, Mr. Sternal, did this conversation that you have just related take place before or after you had agreed to employ Dr. Kasmer's services? A. It was immediately after I agreed to have him install those plates. Again I asked him wouldn't he think it rather advisable to be sure what we were doing, at which point he waved it aside. He was negative in the matter, said "*There is nothing serious in there. We can fix that.*"

- 17 Q. Now, coming back to your conversation on the first visit, where you have just said that you asked Dr. Kasmer if you should see a physician—at that time, do you recall any statement made by Dr. Kasmer respecting his qualifications to treat your tongue? A. When I did ask him whether it would be advisable to consult another physician, he told, in effect, that his experience is very wide and diversified, partly in his local practice and also he had broadened his experience by going in the Mayo Clinic and having observations there, watch-
- 18 ing the doctors operating, and *by virtue of this experience he knows what he is talking about and that I should have full faith and confidence in his treatment.*

\* \* \* \* \*

- 46 Q. Did you ever discuss with Dr. Kasmer whether or not you should consult a physician about your tongue? A. A question—

Q. Just "yes" or "no." A. I asked Dr. Kasmer whether a physician should be consulted.

47 Q. And how many such discussions did you have with Dr. Kasmer? A. I brought that up three times, that I am positive of, I brought it up three times.

Q. Now, let's take the three times: When was the first such conversation? A. On the first visit. \* \* \* I said to him, "Don't you think a physician should be consulted to definitely ascertain what is wrong with my tongue?"

Q. And what did Dr. Kasmer say in reply to that question? A. *He was consistent in his denial of such a necessity.*

Q. What did he say? A. I cannot quote him word for word, but he said, in substance, that that necessity does not exist, *it was not necessary to call in a physician.*

\* \* \* \* \*

48 Q. Now, when did the third conversation take place? A. About either the very end of March or during April.

Q. And what did you then say to Dr. Kasmer? \* \* \*

A. The substance of our conversation was that, I called to his attention the tongue not healing up, that the *teeth which he installed in my mouth are also rubbing against the open wound and are keeping it open.*

Q. And—— A. And that the pains from there were unbearable, and then in that conversation he admitted——

Q. Tell us what he said, what Dr. Kasmer said. A. He said, in effect, that first of all he assuaged my worries about my tongue. He said, "You worry, concentrate too much on your tongue. You should concentrate on helping and cooperating with me and helping me to finish this job by wearing the teeth so that I can tell from your gums what is necessary—what necessarily must be done by way of adjustment of these plates." He further said, in effect, that "*if you continue with the*

50 *prescription such as I have made to you, using the metaphor, that tongue will heal up and other than that just forget it and I will help speed up the healing of that wound by definitely and positively eliminating that friction, by making you another set of teeth, or another set of plates which have no teeth on that side of the injured tongue and that will positively eliminate the friction and the tongue will heal up before you know."*

Q. In that conversation which you have described, did you or did Dr. Kasmer use the word "physician"?

A. Absolutely I used the word.

Q. How did you use it and how did Dr. Kasmer use the word? Will you describe what you said concerning a physician? A. Well, I made the suggestion that we should—I asked him, "Don't you think we should"—I didn't say "we," I used it in the impersonal form, I know that, "Don't you think a physician or a clinical laboratory should be consulted that will examine the trouble of the tongue?"

Q. And what did Dr. Kasmer say to that? A. In each case he waved it away. *He said that it isn't necessary, there is nothing serious about your tongue, and he kept on telling me that I should, once and for all, forget the tongue so much and not concentrate so much on the tongue, but cooperate with him in adjusting the plates so that he can get through with the job.*

51 Q. What qualifications, if any, did Dr. Kasmer say he possessed to treat your tongue? A. *On those occasions he did build up my confidence in him again by saying he knows what he is doing, he has diversified experience, he has the special experience he gained while making observations at the Mayo Clinic, and that—well—*

\* \* \* \* \*

- 53 Q. *Mr. Sternal, did Dr. Kasmer ever advise you seeing a physician about your tongue?* A. *That has never been said to me by him.*

\* \* \* \* \*

*Mr. Paul Sternal* (Plaintiff)—cross examination, by Mr. Cummins:

- 109 Q. Now, will you explain to this court and jury, after suffering for six months, why did you return to Dr. Kasmer to have your teeth cleaned? A. *Because he continued to build me up in confidence, build up my confidence in him.*

Q. Certain statements he made, is that what you referred to? A. Yes, whenever I expressed concern to him about not realizing the proper progress in my trouble, he kept on assuaging me that, that is, I should stand a little pain and continue to cooperate with him and everything would be all right, just continuing concentrating—*don't concentrate so much on your tongue, but cooperate with me*, and that is how he managed to keep up my spirits and believe him, and he *several times said that he knows what he is doing by virtue of his diversified experience both here, as well as at Mayo Clinic, that he mentioned quite often as knowing what he was doing, and I thought that I was in the right hands.*

\* \* \* \* \*

#### H. CANCER OF THE TONGUE IS CURABLE IF TREATED EARLY.

*Dr. Maurice Kossow*—direct examination, by Mr. Fegan:

- 156 Q. Well, has it been your experience that cancer is curable? A. Curable? Yes, *some kinds of cancer are.*

Q. What kinds, for instance, are curable? A. *Cancers which are easily accessible.*

\* \* \* \* \*

Dr. Oscar B. Hunter—direct examination, by Mr. Fegan:

- 213 Q. What advantages, if any, would there have been  
in detecting and treating Mr. Sternal's condition, had it  
been detected in the earlier stages? \* \* \* A. The  
214 only thing I can say, of course, is *the earlier cancer is*  
*discovered* and the more radical the treatment that is  
instituted, *the greater are possibilities the individual has*  
*of effecting possible cure.*

Dr. Oscar B. Hunter—direct examination, by Mr. Fegan:

- 217 Q. Doctor, is cancer curable? A. That is a question  
that is still confronting the medical profession. In some  
instances we believe we are able to cure cancer \* \* \*.

\* \* \* \* \*

Dr. Daniel Lynch—direct examination, by Mr. Cummins:

- 267 Q. Now, Doctor, is there any positive definite cure for  
cancer? A. *I have seen what I thought were cures, yes;*  
I have got several cases right here in Washington that  
we made diagnosis of cancer and they have been treated  
and are staying alive. One man is alive after twelve  
years, and in cancer therapy we consider a five-year cure  
a good cure. I have another gentleman, 63, when we  
made the diagnosis, and he received treatment with  
X-ray, and he died a normal death of heart disease about  
eleven years later. So, I mean I would consider him  
cured.

*It seems to me that cancer of the mouth will invari-*  
*ably respond to treatment, I mean, get good results in*  
*the treatment of cancer, if the cancer doesn't involve*  
*the bone \* \* \*.*



